June 2003

MJI Publication Updates

Child Protective Proceedings Benchbook

Contempt of Court Benchbook (Revised Edition)

Crimes Victim Rights Manual

Criminal Procedure Monograph 2--Issuance of Search Warrants (Revised Edition)

Criminal Procedure Monograph 5--Preliminary Examinations (Revised Edition)

Criminal Procedure Monograph 6--Pretrial Motions

Criminal Procedure Monograph 7--Probation Revocation (Revised Edition)

Domestic Violence Benchbook (2d ed)

Friend of the Court Domestic Violence Resource Book

Juvenile Justice Benchbook (Revised Edition)

Sexual Assault Benchbook

Traffic Benchbook--Revised Edition, Vol. 1

June 2003

Update: Child Protective Proceedings Benchbook

Note: The court rules governing child protective proceedings have been amended extensively. See Michigan Supreme Court Orders 1998-50 and 2001-19, effective May 1, 2003. The *Child Protective Proceedings Benchbook* will be revised in the near future to include those court rule amendments and other changes that have occurred since the benchbook's publication. To view the court rule amendments, please go to http://courts.michigan.gov/supremecourt/Resources/Administrative/index.htm#approvedwww.

CHAPTER 18

Hearings on Termination of Parental Rights

18.29 Termination on the Grounds of Failure to Rectify Conditions Following the Court's Assumption of Jurisdiction–§19b(3)(c)

Insert the following case summary as the first bulleted item on page18-34:

F *In re JK,* ___ Mich ___ (2003)

The Michigan Supreme Court reversed the decision of the trial court to terminate the respondent-mother's parental rights pursuant to MCL 712A.19b(3)(c)(ii) and 712A.19b(3)(g). The lower court terminated the mother's parental rights based upon the "other conditions" provision of MCL 712A.19b(3)(c)(ii). The "other condition" that the lower court relied upon was the lack of a bond or attachment between the mother and the child that arose after the child was placed in foster care. ___ Mich at ___. At the hearing on termination of parental rights, respondent-mother's therapist testified that mother and child had appropriately bonded and were attached. However, another therapist, who met with respondent-mother and child for less than one hour, testified that respondent-mother and child were not well-bonded or attached, but that this may have resulted from the child's placement in foster care. ___ Mich at ___. The Supreme Court reversed the lower court's finding and stated the following:

> "In concluding that the respondent and her child were not properly bonded, the trial court ignored the fact that, immediately after the agency filed the petition for termination of parental rights, visitation was automatically suspended for several months pursuant to MCL 712A.19b(4). The counselor was then notified only two months before trial to address the bonding and attachment issue with the respondent. Any suggestion that the respondent was given 'a reasonable opportunity' to rectify the alleged bonding and attachment issue is unwarranted. . . .
>
> "The fundamental right of a parent and child to maintain the family relationship can be overcome only by clear and convincing evidence, which, in this case, was not supplied by this single witness who observed the mother and child together for just one hour at a time when she had been addressing the bonding and attachment issue in therapy for less than one month." ___ Mich at ___. [Footnote omitted.]

*See Section 18.33.

The Supreme Court also held that the petitioner failed to present clear and convincing evidence for termination of parental rights under MCL 712A.19b(3)(g).

CHAPTER 18

Hearings on Termination of Parental Rights

18.33 Termination on the Grounds of Failure to Provide Proper Care or Custody–§19b(3)(g)

Insert the following as the first bulleted item in the subsection "Case Law" on page 18-38:

F *In re JK,* ___ Mich ___ (2003)

Where the respondent-mother fulfilled every requirement of the parent-agency agreement, termination of her parental rights pursuant to MCL 712A.19b(3)(g) was improper. The Michigan Supreme Court reversed the lower court's order terminating the respondent-mother's parental rights and provided the following:

> "The respondent in this case fulfilled every requirement of the parent-agency agreement. Her compliance negated any statutory basis for termination.
>
> "This Court has held that a parent's failure to comply with the parent-agency agreement is evidence of a parent's failure to provide proper care and custody for the child. [*In re Trejo Minors,* 462 Mich 341, 360–363 (2000)]. By the same token, the parent's *compliance* with the parent-agency agreement is evidence of her ability to provide proper care and custody.[20]

"[20] If the agency has drafted an agreement with terms so vague that the parent remains 'unfit,' even on successful completion, then the agreement's inadequacies are properly attributable to the agency and cannot form the basis for the termination of parental rights. Even if, in some case, it can be conceived that satisfaction by the parent of the parent-agency agreement does not render the parent 'fit,' in this case we are satisfied that the respondent's satisfaction of the agreement did evidence that she was no longer an 'unfit' parent." ___ Mich at ___.

June 2003

Update: Contempt of Court Benchbook (Revised Edition)

CHAPTER 4

Sanctions for Contempt of Court

4.4 Statutory Exceptions to the General Penalty Provisions of the Revised Judicature Act

C. Failure to Pay Child or Spousal Support

Effective June 1, 2003, 2002 PA 567 amended MCL 552.633 and 552.635. On page 39 replace the language in Section 4.4(C) with the following language:

Several sections of the Support and Parenting Time Enforcement Act, MCL 552.601 et seq., govern support arrearages and associated sanctions. MCL 552.633(1) provides the court may find a payer in contempt if the court finds the payer in arrears and the court is satisfied that the payer has the "capacity to pay out of currently available resources" all or some portion of the amount due under the order. If the payer does not show the court otherwise, the court must presume that the payer has currently available resources equal to four weeks of payments under the order. The court must not find that the payer has currently available resources of more than four weeks of payments without proof from the Friend of the Court or the recipient of the support. MCL 552.633(1). If the court finds a payer in contempt of court pursuant to MCL 552.633(1), the court may enter an order doing one or more of the following:

> "(a) Committing the payer to the county jail.
>
> "(b) Committing the payer to the county jail with the privilege of leaving the jail during the hours the court determines, and under the supervision the court considers, necessary for the purpose of allowing the payer to go to and return from his or her place of employment.
>
> "(c) Committing the payer to a penal or correctional facility in this state that is not operated by the state department of corrections.

> "(d) If the payer holds an occupational license, driver's license, or recreational or sporting license, conditioning a suspension of the payer's license, or any combination of the licenses, upon noncompliance with an order for payment of the arrearage in 1 or more scheduled installments of a sum certain. A court shall not order the sanction authorized by this subdivision unless the court finds that the payer has accrued an arrearage of support payments in an amount greater than the amount of periodic support payments payable for 2 months under the payer's support order.
>
> "(e) Ordering the payer to participate in a work activity. This subdivision does not alter the court's authority to include provisions in an order issued under this section concerning a payer's employment or his or her seeking of employment as that authority exists on August 10, 1998.
>
> "(f) If available within the court's jurisdiction, order the payer to participate in a community corrections program established as provided in the community corrections act, 1988 PA 511, MCL 791.401 to 791.414."

MCL 552.635(1) provides that the court may find a payer in contempt if the court finds all of the following:

- the payer is in arrears,
- the court is satisfied that by the "exercise of diligence" the payer could have the capacity to pay all or some portion of the support order, and
- the payer fails or refuses to pay the support order.

If the court finds the payer in contempt pursuant to MCL 552.635(1), then pursuant to MCL 552.635(2)(a)–(d), the court may immediately enter an order doing one or more of the following:

> "(a) Committing the payer to the county jail with the privilege of leaving the jail during the hours the court determines, and under the supervision the court considers, necessary for the purpose of allowing the payer to go to and return from his or her place of employment or, if the person wishes to seek employment, to seek employment.
>
> "(b) If the payer holds an occupational license, driver's license, or recreational or sporting license, conditioning a suspension of the payer's license, or any combination of the licenses, upon noncompliance with an order for payment of the arrearage in 1 or more scheduled installments of a sum certain. A court shall not order the sanction authorized by this subdivision unless the court finds that the payer has accrued an arrearage of support payments

> in an amount greater than the amount of periodic support payments payable for 2 months under the payer's support order.
>
> "(c) Ordering the payer to participate in a work activity. This subdivision does not alter the court's authority to include provisions in an order issued under this section concerning a payer's employment or his or her seeking of employment as that authority exists on August 10, 1998.
>
> "(d) If available within the court's jurisdiction, order the payer to participate in a community corrections program established as provided in the community corrections act, 1988 PA 511, MCL 791.401 to 791.414."

An order of commitment under MCL 552.633 or 552.635 must be entered only if other remedies appear unlikely to correct the payer's failure or refusal to pay support. MCL 552.637(1).

The order of commitment must continue until the amount ordered to be paid is paid, but must not exceed 45 days for the first adjudication of contempt or 90 days for a subsequent adjudication of contempt. MCL 552.637(4).

CHAPTER 5

Common Forms of Contempt of Court

5.9 Failure to Pay Child or Spousal Support

A. Statutes

Effective June 1, 2003, 2002 PA 567 amended MCL 552.631. On page 55 replace the language in Section 5.9(A) starting with the paragraph that begins "The Support and Parenting Time Enforcement Act. . ." with the following language:

*MCR 3.208 governs procedure under this Act.

The Support and Parenting Time Enforcement Act, MCL 552.601 et seq.,* also provides for the use of contempt powers to enforce child or spousal support orders:

*Under MCL 552.613, the court may find an "income source" guilty of contempt for violating an order of income withholding.

> "(1) If a person is ordered to pay support under a support order and fails or refuses to obey and perform the order, and if an order of income withholding is inapplicable or unsuccessful,* a recipient of support or the office of the friend of the court may commence a civil contempt proceeding by filing in the circuit court a petition for an order to show cause why the delinquent payer should not be held in contempt. If the payer fails to appear in response to an order to show cause, the court shall do 1 or more of the following:
>
> > "(a) Find the payer in contempt for failure to appear.
> >
> > "(b) Find the payer in contempt for the reasons stated in the motion for the show cause hearing.
> >
> > "(c) Apply an enforcement remedy authorized under this act or the friend of the court act for the nonpayment of support.
> >
> > "(d) Issue a bench warrant for the payer's arrest requiring that the payer be brought before the court without unnecessary delay for further proceedings in connection with the show cause or contempt proceedings.
> >
> > "(e) Adjourn the hearing.
> >
> > "(f) Dismiss the order to show cause if the court determines that the payer is not in contempt." MCL 552.631(1)(a)–(f).

The Support and Parenting Time Enforcement Act defines "support" to include all of the following:

"(i) The payment of money for a child or a spouse ordered by the circuit court, whether the order is embodied in an interim, temporary, permanent, or modified order or judgment. Support may include payment of the expenses of medical, dental, and other health care,* child care expenses, and educational expenses.

"(ii) The payment of money ordered by the circuit court under the paternity act, 1956 PA 205, MCL 722.711 to 722.730, for the necessary expenses incurred by or for the mother in connection with her confinement, for other expenses in connection with the pregnancy of the mother, or for the repayment of genetic testing expenses.*

"(iii) A surcharge accumulated under section 3a." MCL 552.602(ee)(i)–(iii).

*See MCL 552.626, on contempt sanctions for failure to maintain health care coverage.

*Under MCL 722.719(3), the court may use its contempt powers to enforce such orders.

Note: The property settlement provisions of a divorce judgment may not be enforced using the contempt power. See Section 5.8(B), on page 53.

CHAPTER 5

Common Forms of Contempt of Court

5.9 Failure to Pay Child or Spousal Support

C. Ability to Pay Support Arrearage and Sanctions

Effective June 1, 2003, 2002 PA 567 amended MCL 552.633 and 552.635. On page 57 replace the second and third full paragraphs, beginning with "MCL 552.633 . . ." with the following language:

MCL 552.633(1) provides the court may find a payer in contempt if the court finds the payer in arrears and the court is satisfied that the payer has the "capacity to pay out of currently available resources" all or some portion of the amount due under the order. If the payer does not show the court otherwise, the court must presume that the payer has currently available resources equal to four weeks of payments under the order. The court must not find that the payer has currently available resources of more than four weeks of payments without proof from the Friend of the Court or the recipient of the support. MCL 552.663(1). If the court finds a payer in contempt of court pursuant to MCL 552.633(1), the court may enter an order doing one or more of the following:

> "(a) Committing the payer to the county jail.
>
> "(b) Committing the payer to the county jail with the privilege of leaving the jail during the hours the court determines, and under the supervision the court considers, necessary for the purpose of allowing the payer to go to and return from his or her place of employment.
>
> "(c) Committing the payer to a penal or correctional facility in this state that is not operated by the state department of corrections.
>
> "(d) If the payer holds an occupational license, driver's license, or recreational or sporting license, conditioning a suspension of the payer's license, or any combination of the licenses, upon noncompliance with an order for payment of the arrearage in 1 or more scheduled installments of a sum certain. A court shall not order the sanction authorized by this subdivision unless the court finds that the payer has accrued an arrearage of support payments in an amount greater than the amount of periodic support payments payable for 2 months under the payer's support order.
>
> "(e) Ordering the payer to participate in a work activity. This subdivision does not alter the court's authority to include provisions in an order issued under this section concerning a

payer's employment or his or her seeking of employment as that authority exists on August 10, 1998.

"(f) If available within the court's jurisdiction, order the payer to participate in a community corrections program established as provided in the community corrections act, 1988 PA 511, MCL 791.401 to 791.414."

MCL 552.635(1) provides that the court may find a payer in contempt if the court finds all of the following:

- the payer is in arrears,
- the court is satisfied that by the "exercise of diligence" the payer could have the capacity to pay all or some portion of the support order, and
- the payer fails or refuses to pay the support order.

If the court finds the payer in contempt pursuant to MCL 552.635(1), then pursuant to MCL 552.635(2)(a)—(d), the court may immediately enter an order doing one or more of the following:

"(a) Committing the payer to the county jail with the privilege of leaving the jail during the hours the court determines, and under the supervision the court considers, necessary for the purpose of allowing the payer to go to and return from his or her place of employment or, if the person wishes to seek employment, to seek employment.

"(b) If the payer holds an occupational license, driver's license, or recreational or sporting license, conditioning a suspension of the payer's license, or any combination of the licenses, upon noncompliance with an order for payment of the arrearage in 1 or more scheduled installments of a sum certain. A court shall not order the sanction authorized by this subdivision unless the court finds that the payer has accrued an arrearage of support payments in an amount greater than the amount of periodic support payments payable for 2 months under the payer's support order.

"(c) Ordering the payer to participate in a work activity. This subdivision does not alter the court's authority to include provisions in an order issued under this section concerning a payer's employment or his or her seeking of employment as that authority exists on August 10, 1998.

"(d) If available within the court's jurisdiction, order the payer to participate in a community corrections program established as provided in the community corrections act, 1988 PA 511, MCL 791.401 to 791.414."

The order of commitment must continue until the amount ordered to be paid is paid, but must not exceed 45 days for the first adjudication of contempt or 90 days for a subsequent adjudication of contempt. MCL 552.637(4).

Note: The amendments to MCL 552.633 and 552.635, provided above, do not alter the existing law with regards to MCL 552.633(1)(d) (license suspension) and MCL 552.635(2)(c) (work activity) as provided in the remaining text on the bottom of page 57.

CHAPTER 5

Common Forms of Contempt of Court

5.22 Contempt of Court Under the Juvenile Code

A. Statutes and Court Rule

Effective May 1, 2003, the court rules governing juvenile proceedings were extensively amended. On page 74, replace the first paragraph and the quoted material beneath it with the following:

MCR 3.928 also provides a description of the applicable procedures and penalties for contempt of court:

> "(A) The court has the authority to hold persons in contempt of court as provided by MCL 600.1701 and 712A.26. A parent, guardian, or legal custodian of a juvenile who is within the court's jurisdiction and who fails to attend a hearing as required is subject to the contempt power as provided in MCL 712A.6a.
>
> "(B) Contempt of court proceedings are governed by MCL 600.1711, 600.1715, and MCR 3.606. MCR 3.982–3.989 governs proceedings against a minor for contempt of a minor personal protection order.
>
> "(C) A juvenile under court jurisdiction who is convicted of criminal contempt of court, and who was at least 17 years of age when the contempt was committed, may be sentenced to up to 30 days in the county jail as a disposition for the contempt. Juveniles sentenced under this subrule need not be lodged separate and apart from adult prisoners. Younger juveniles found in contempt of court are subject to a juvenile disposition under these rules."

CHAPTER 5

Common Forms of Contempt of Court

5.22 Contempt of Court Under the Juvenile Code

C. Enforcement of Personal Protection Orders (PPOs) Against Juveniles

Replace the two paragraphs at the top of page 75 with the following paragraph:

The Family Division of Circuit Court has jurisdiction over proceedings involving a personal protection order issued under MCL 600.2950 and 600.2950a, in which the respondent is a juvenile less than 18 years of age. MCL 712A.2(h). Court rules governing procedure for juvenile violations of personal protection orders are found in MCR 3.982–3.989. Violations of personal protection orders may be punished by contempt sanctions.

June 2003

Update: Crime Victim Rights Manual

Note:

Pursuant to Supreme Court Order No. 1998-50 and No. 2001-19, effective May 1, 2003, the Court adopted new subchapter 3.900 of the Michigan Court Rules, deleted subchapter 5.900, and amended rules in subchapter 6.900, all with regard to proceedings involving juveniles. Every effort has been made to identify and update the information contained in this publication where the amendments have a substantive impact. Changes limited to alpha-numeric order and related ministerial revisions are reserved for the next comprehensive update of the publication.

CHAPTER 2

The Legal Bases of Crime Victim Rights in Michigan

2.4 Limitations on Standing to Appeal Court Decisions

Replace the last 3 sentences at the bottom of page 18 and the top of page 19 with the following:

Effective May 1, 2003, MCR 3.903(A)(18) made a significant change in the definition of "party" as the term pertains to juvenile delinquency proceedings. A juvenile's parent is no longer a "party" for purposes of juvenile delinquency proceedings. MCR 3.903(A)(18)(a).

2.8 Assessments and Funding

A. Assessments of Convicted and Adjudicated Offenders

Add the following to the end of the second paragraph on page 25:

At a juvenile's dispositional hearing, MCR 3.943(E)(5) limits a court to ordering the juvenile to pay only one assessment under the CVRA, regardless of the number of offenses.

CHAPTER 3

Overview of the Crime Victim's Rights Act

3.2 Definitions of Terms Used in the CVRA

A. "Assaultive Crime"

1. A conviction or adjudication for some "assaultive crimes" may not be set aside.

Insert the following sentence before the first paragraph on page 36:

Setting aside adjudications and convictions is wholly governed by statutory procedure. Amended court rule 3.925(F)(1)–(2) indicates that setting aside adjudications and convictions is a process subject to the procedures outlined in MCL 712A.18e and MCL 780.621 *et seq*., respectively.

CHAPTER 4

Protection from Revictimization

4.5 Conditions of Release for Juveniles Pending Trial or Appeal

Replace the first two paragraphs of Section 4.5 (including the list lettered (a) through (h)) on pages 59-60 with the following:

*MCR 3.935(C) applies to juvenile delinquency cases, "traditional waiver" cases, and designated cases. See Section 3.2(H) for descriptions of these types of cases.

Effective May 1, 2003, MCR 3.935(C)* lists factors that a court must consider when deciding whether to detain a juvenile or release him or her, with or without conditions. MCR 3.935(E), a new subrule, contains a nonexhaustive list of conditions of release that may be imposed upon a juvenile and provides for revocation of release for violations of such conditions.

When determining whether to release or detain a juvenile, the court must consider the following factors:

> "(a) the juvenile's family ties and relationships,
>
> "(b) the juvenile's prior delinquency record,
>
> "(c) the juvenile's record of appearance or nonappearance at court proceedings,
>
> "(d) the violent nature of the alleged offense,
>
> "(e) the juvenile's prior history of committing acts that resulted in bodily injury to others,
>
> "(f) the juvenile's character and mental condition,
>
> "(g) the court's ability to supervise the juvenile if placed with a parent or relative, and
>
> "(h) any other factor indicating the juvenile's ties to the community, the risk of nonappearance, and the danger to the juvenile or the public if the juvenile is released." MCR 3.935(C)(1)(a)–(h).

MCR 3.935(E) combines language found in former MCR 5.935(C) with a nonexhaustive list of specific conditions a court may impose on a juvenile's release:

> "(1) The court may release a juvenile to a parent pending the resumption of the preliminary hearing, pending trial, or until further order without conditions, or, if the court determines that release with conditions is necessary to reasonably ensure the

appearance of the juvenile as required or to reasonably ensure the safety of the public, the court may, in its discretion, order that the release of the juvenile be on the condition or combination of conditions that the court determines to be appropriate, including, but not limited to:

> "(a) that the juvenile will not commit any offense while released,
>
> "(b) that the juvenile will not use alcohol or any controlled substance or tobacco product,
>
> "(c) that the juvenile will participate in a substance abuse assessment, testing, or treatment program,
>
> "(d) that the juvenile will participate in a treatment program for a physical or mental condition,
>
> "(e) that the juvenile will comply with restrictions on personal associations or place of residence,
>
> "(f) that the juvenile will comply with a specified curfew,
>
> "(g) that the juvenile will maintain appropriate behavior and attendance at an educational program, and
>
> "(h) that the juvenile's driver's license or passport will be surrendered." MCR 3.935(E)(1)(a)–(h).

In addition to other conditions of release, the court may require a juvenile's parent, guardian, or legal custodian to post bail for the juvenile's release. MCR 3.935(F). The court may also grant bail to a juvenile pending decision on a request for review of a referee's recommended findings and conclusions, MCR 3.911(G), or on a request for rehearing, MCR 3.992(F). The juvenile's parent, guardian, or legal custodian has the right to post bail for the release of the juvenile. MCL 712A.17(3).

The amended court rules provide a court with discretion over the consequences to a juvenile's violation of a conditional release. If a violation is alleged, MCR 3.935(E)(2) permits the court to order the immediate apprehension and detention of the juvenile. After providing the juvenile with an opportunity to be heard, the court may elect to modify the conditions placed on the juvenile's release or to revoke the juvenile's release status.

4.7 Conditions of Probation and Parole Orders to Protect a Named Person

Insert the following at the end of Section 4.7 on page 62:

In making second and subsequent dispositions in juvenile delinquency proceedings, the court must consider

> "imposing increasingly severe sanctions, which may include imposing additional conditions of probation; extending the term of probation; imposing additional costs; ordering a juvenile who has been residing at home into an out-of-home placement; ordering a more restrictive placement; ordering state wardship for a child who has not previously been a state ward; or any other conditions deemed appropriate by the court. Waiver of jurisdiction to adult criminal court, either by authorization of a warrant or by judicial waiver, is not considered a sanction for the purpose of this rule." MCR 3.943(E)(2).

CHAPTER 5
Victim Privacy

5.2 The Victim May Permit an Interview by Defense Counsel

Add the following text after the second paragraph of Section 5.2 on page 76:

Taking depositions in juvenile proceedings requires the court's authorization. MCR 3.922(A)(3).

5.9 Limitations on Access to Identifying Information in Court and Agency Documents

B. Juvenile Delinquency Cases

Replace the first two paragraphs under subsection (B) on pages 85–86 with the following:

The amended court rules effective May 1, 2003, added a new section to the list of files defined as confidential and to which only persons with a legitimate interest have access. MCR 3.903(A)(3)(b) characterizes the contents of a juvenile's social file, including victim statements, as confidential. MCR 3.903(A)(3)(b)(vi).

Under MCL 712A.28(2) and MCR 3.925(D)(1), the general rule is that all *records* in juvenile cases are open to the general public, while *confidential files* are not open to the public. MCR 3.903(24) defines "records" as the pleadings, motions, authorized petitions, notices, memorandums, briefs, exhibits, available transcripts, findings of the court, register of actions, and court orders. MCR 3.903(A)(3)(a) defines "confidential files" as all materials made confidential by statute or court rule, including:

- the separate statement about known victims of juvenile offenses as required by MCL 780.784,* and

- the testimony taken during a closed proceeding pursuant to MCR 3.925(A) and MCL 712A.17(7).*

*See Section 7.4 on this statement.

*See Section 5.14, below, for discussion of closing juvenile proceedings to the public.

"Confidential files" may only be accessed by an individual the court determines has a legitimate interest in the files. MCR 3.925(D)(2). In determining whether a person has a legitimate interest, the court must consider:

- the nature of the proceedings;

- the public's welfare and safety;

- the interest of the minor; and

- any restriction imposed by state or federal law.

CHAPTER 6

Victim Consultation With the Prosecuting Attorney & Other Rights

6.4 Limitations on the Court's Authority to Utilize Informal Procedures in Juvenile Delinquency Cases

A. The Court Must "Accept" Certain Petitions

Insert the following sentence before the beginning of the text under Section 6.4(A) on page 95:

Court rule amendments effective May 1, 2003 integrated procedural requirements specifically related to the CVRA into juvenile delinquency proceedings. MCR 3.932(B).

Replace the language of the third and fourth bullets on page 95 with the following:

- direct that the juvenile and his or her parent, guardian, or legal custodian be notified to appear so that the matter can be handled through further informal inquiry;
- before authorizing the petition to be filed, proceed on the consent calendar;

Insert the following language after the quotation of MCL 780.786(1), near the bottom of page 95:

If the alleged offense is one enumerated in the CVRA, a preliminary inquiry must be conducted on the record. MCR 3.932(A).

At the top of page 96, please note the slight change to the definition of "petition authorized to be filed" made by new MCR 3.903(A)(20). A "petition authorized to be filed" refers to written permission given by the court to file the petition containing the formal allegations against the juvenile or respondent with the clerk of the court.

Also, in the third line at the top of page 96, note that *four* procedural options must occur before the court may authorize the filing of a petition.

6.4 Limitations on the Court's Authority to Utilize Informal Procedures in Juvenile Delinquency Cases

A. The Court Must "Accept" Certain Petitions

2. The Michigan Court Rules govern practice and procedure in Michigan courts.

Insert the following paragraph on page 97 before "B. Required Procedures Before Removing the Case From the Adjudicative Process":

Amendments to the court rules involving juvenile proceedings (effective May 1, 2003) reconciled a potential for conflict between the Legislature's sole authority to enact substantive law and the Supreme Court's exclusive authority over practice and procedure in the courts. Newly added subrule 3.932(B) prohibits the removal of a juvenile case from the adjudicative process when the offense allegedly committed is listed in the CVRA, MCL 780.781(1)(f). In such cases, subrule (B) conditions removal from the adjudicative process on compliance with procedures set forth in the CVRA. MCL 780.786b.

6.4 Limitations on the Court's Authority to Utilize Informal Procedures in Juvenile Delinquency Cases

B. Required Procedures Before Removing the Case From the Adjudicative Process

Replace the text in the second bulleted paragraph on page 98 with the following language:

- A court may proceed on the consent calendar without authorizing a petition to be filed if it appears that the juvenile's and the public's best interests would be served by protective and supportive action. MCR 3.932(C). The court may not place a juvenile's case on the consent calendar unless the juvenile and the juvenile's parent, guardian, or legal custodian agree to the placement. Pursuant to the rule amendments effective May 1, 2003, a juvenile may *not* enter a formal plea in a consent calendar case, and the court may *not* enter an adjudication or disposition on the case. MCR 3.932(C)(2) and (6). However, "[i]f it appears to the court that the juvenile has engaged in conduct that would subject the juvenile to the jurisdiction of the court, the court may issue a written consent calendar case plan." MCR 3.932(C)(4). No provision may be made to remove the juvenile from the custody of the juvenile's parent, guardian, or legal custodian. MCR 3.932(C)(5). Except as required by Article 2 of the CVRA, formal notice of the court's placement of the juvenile's case on the consent calendar is not necessary. MCR 3.932(C)(1). A victim may attend a "consent calendar conference." MCR 3.932(C)(3).

CHAPTER 7

Victim Notification

7.5 Notification of the Proposed Removal of a Juvenile Delinquency Case From the Adjudicative Process

Insert the following paragraph on page 112 before Section 7.6:

The removal of a case under MCL 780.781(f) from the adjudicative process is expressly conditioned on compliance with the procedures set forth in the CVRA. MCR 3.932(B). See MCL 780.786b. Except as required by article 2 of the CVRA, no formal notice is required for cases placed on the consent calendar.

7.12 Notification of the Prisoner's or Juvenile's Status Within Corrections or Juvenile Agencies

F. Juvenile Commitment Review Hearings

1. Required Review Hearings in Juvenile Delinquency Cases

Replace the first paragraph on page 126 with the following language:

MCR 3.945(A)(1)* expressly provides a crime victim with the right to make a statement or to submit a written statement for use at a juvenile's periodic review hearings. When a juvenile committed to FIA for one of the offenses specified in MCL 712A.18d remains under the court's jurisdiction after the juvenile's 18th birthday, the court must hold a hearing to determine whether to extend its jurisdiction until the juvenile turns 21. MCR 3.945(B)(1). The hearing must be held before, but as nearly as possible to, the juvenile's 19th birthday. MCR 3.945(B)(1)(a). If the victim requests, the prosecuting attorney must give the victim notice of the hearing to extend jurisdiction. MCL 780.798(9).

*Former court rule MCR 5.944 was divided into two rules: MCR 3.944 (probation violation) and MCR 3.945 (dispositional review).

CHAPTER 8

The Crime Victim at Trial

8.6 Special Protections for Child or Developmentally Disabled Victim-Witnesses

Replace the last sentence on page 160 with the following language:

Amended court rule MCR 3.923(F) permits the court to appoint an impartial *person* to question a child witness in juvenile delinquency proceedings. Under the former rule, the court could appoint only an impartial psychologist or psychiatrist to address questions to a child witness.

Insert the following at the bottom of page 160:

Effective May 1, 2003, new MCR 3.922(E)(1) requires that a notice of intent be filed with the court and served on all parties with regard to a party's intent to:

> "(a) use a support person, including the identity of the support person, the relationship to the witness, and the anticipated location of the support person during the hearing.*

*See page 163 for more information about support persons.

> "(b) request special arrangements for a closed courtroom or for restricting the view of the respondent/defendant from the witness or other special arrangements allowed under law and ordered by the court.*

*See page 164 for information about arranging the courtroom.

> "(c) use a videotaped deposition as permitted by law."*

*See page 165 for information on the use of videotapes and closed-circuit television.

> "(d) admit out-of-court hearsay statements under MCR 3.972(C)(2), including the identity of the persons to whom a statement was made, the circumstances leading to the statement, and the statement to be admitted." MCR 3.922(E)(1)(a)–(d).

CHAPTER 9

Victim Impact Statements & Other Post-Disposition Procedures

9.2 Using Victim Impact Statements at Sentencing or Disposition

B. At Sentencing or Disposition Hearings

Add the following sentence to the second paragraph on page 200:

MCR 3.943(D)(2) also recognizes the victim's right to be present and to give an impact statement at a juvenile's dispositional hearing.

C. The Court's Use of Letters Sent by Victims and Others to the Court

Add the following language to the end of the second paragraph on page 201:

Pursuant to the court rule amendments effective May 1, 2003, MCR 3.903(A)(3) defines "confidential files" for purposes of subchapter 3.900. In addition to the former rule's reference to "the separate statement about known victims of juvenile offenses" required by the CVRA, the amended rule characterizes as confidential "the contents of a social file maintained by the court," including any victim statements.

June 2003

Update: Criminal Procedure Monograph 2--Issuance of Search Warrants (Revised Edition)

2.14 Other Exceptions Applicable to Search Warrants

E. Exigent Circumstances Doctrine

Insert the following language at the end of Subsection E on page 28:

In *Thacker v City of Columbus*, ___ F3d ___, ___ (2003), the Sixth Circuit stopped short of concluding that a warrantless entry may be justified solely on the basis of a 911 call placed from the residence into which the entry was made. However, the 911 call's point of origin was an important factor in the Court's analysis of "the totality of circumstances" justifying the officers' warrantless entry. In *Thacker*, the female plaintiff telephoned 911 to request medical treatment for an injury to the male plaintiff's wrist. Two paramedics and two police officers responded to the call. The male plaintiff who greeted the officers at the door was bleeding profusely, "[v]isibly intoxicated and immediately belligerent." *Thacker*, *supra* ___ F3d at ___.

Among other claims, the plaintiffs brought suit against the two police officers for unlawful entry into their residence. "Although it present[ed] a close question," the Sixth Circuit held that "the uncertainty of the situation, in particular, of the nature of the emergency, and the dual needs of safeguarding the paramedics while tending to Thacker's injury, created exigent circumstances here." *Thacker*, *supra* ___ F3d at ___.

June 2003

Update: Criminal Procedure Monograph 5 – Preliminary Examinations (Revised Edition)

Note:

Pursuant to Supreme Court Order No. 1998-50 and No. 2001-19, effective May 1, 2003, the Court adopted new subchapter 3.900 of the Michigan Court Rules, deleted subchapter 5.900, and amended rules in subchapter 6.900, all with regard to proceedings involving juveniles. Every effort has been made to identify and update the information contained in this publication where the amendments have a substantive impact. Changes limited to alpha-numeric order and related ministerial revisions are reserved for the next comprehensive update of the publication.

5.7 Juvenile's Right to a Preliminary Examination

B. No Right to a Preliminary Examination in "Traditional Waiver" Cases

Replace the first sentence of the last paragraph on page 12 with the following language:

The second phase, known as a Phase 2 "best interests" hearing, is a hearing in which the court determines whether the interests of the juvenile and the public would best be served by granting the motion for waiver of jurisdiction. MCR 3.950(D)(2). If the juvenile had previously been subject to the general criminal jurisdiction of the circuit court under MCL 712A.4 or MCL 600.606, the court must waive jurisdiction without holding a Phase 2 hearing. MCR 3.950(D)(2).

June 2003

Update: Criminal Procedure Monograph 6--Pretrial Motions

6.15 Motion for Compulsory Process of a Defense Witness or Appointment of an Expert Witness at Public Expense

Insert the following language after the second full paragraph on page 23:

Where the defendant satisfied the mandate of *Ake v Oklahoma*, 470 US 68, 83 (1985), by providing the trial court with specific facts in support of the assertion that his sanity was "likely to be a significant factor at trial," the court erred in denying the defendant's request for independent expert psychiatric assistance at trial. *Powell v Collins*, ___ F3d ___, ___ (CA 6, 2003). However, the Sixth Circuit found the trial court's error constitutionally harmless as it concerned the guilt phase of the defendant's trial, because an independent psychiatrist could not have changed the fact that the defendant admitted he kidnapped the victim, intended to rape her, and caused her ultimate death. *Powell*, *supra*, ___ F3d at ___. According to the Sixth Circuit, the trial court's refusal to appoint an independent psychiatric expert to assist the defendant during the penalty phase in a capital case was reversible error. In *Powell*, the Court held that an indigent defendant's constitutional right to expert psychiatric assistance was not satisfied—at either the guilt or the penalty phases—by the trial court's appointment of a "neutral" clinician available to both parties. *Powell*, *supra*, ___ F3d at ___.

June 2003

Update: Criminal Procedure Monograph 7 – Probation Revocation (Revised Edition)

Note:

Pursuant to Supreme Court Order No. 1998-50 and No. 2001-19, effective May 1, 2003, the Court adopted new subchapter 3.900 of the Michigan Court Rules, deleted subchapter 5.900, and amended rules in subchapter 6.900, all with regard to proceedings involving juveniles. Every effort has been made to identify and update the information contained in this publication where the amendments have a substantive impact. Changes limited to alpha-numeric order and related ministerial revisions are reserved for the next comprehensive update of the publication.

7.2 Rules Applicable to Probation Revocation Proceedings

B. Proceedings Involving Juveniles

Please note that the proposed amendments to MCR 6.933 mentioned in the cross-reference (indicated with *) on page 4 were effective May 1, 2003.

7.24 Lack of Notice of Condition as a Defense to Revocation

Replace the language in the cross-reference (indicated with *) on page 22 with the following:

Effective May 1, 2003, MCR 6.933(B)(1)(b) expressly prohibits a court from revoking a juvenile's probation unless the juvenile was given notice as required by MCR 6.931(F)(2).

7.30 Revocation of "Juvenile Probation"

Replace the first paragraph of Section 7.30 on page 27 with the following paragraph:

A court may not revoke a juvenile's probation unless the juvenile was informed at the original sentencing that conviction of a felony or misdemeanor punishable by more than one year's imprisonment would result in mandatory probation revocation. MCR 6.933(B)(1)(b). If the court finds that a juvenile has violated "juvenile probation" by conviction of a felony or a misdemeanor punishable by more than one year's imprisonment, *and* the juvenile was properly noticed at the original sentencing, the court *must* revoke the juvenile's probation and order the juvenile committed to the Department of Corrections for a term of years not to exceed the penalty that could have been imposed for the offense that led to the probation. MCR 6.933(B)(1)(a). In imposing sentence, the court shall grant credit against the sentence as required by law. MCL 771.7(1) and MCR 6.933(B)(1)(a).

At the top of page 28, replace the first paragraph with the following two paragraphs:

Pursuant to Order No. 1998-50 and No. 2001-19, effective May 1, 2003, amendments to MCR 6.933 address a court's sentencing options after mandatory probation revocation with regard to two specific offenses: manufacture, delivery, or possession with intent to deliver 650 grams (1000 grams beginning March 1, 2003) or more of a controlled substance and first-degree murder. MCR 6.933(C)(1)–(2). Consonant with the Supreme Court's interpretation of MCL 771.7(1) in *People v Valentin*, 457 Mich 1, 13–14 (1998), subrule (C)(1) provides that a juvenile who is placed on probation and committed to state wardship for manufacture, delivery, or possession with intent to deliver 650 grams (1000 grams beginning March 1, 2003) or more of a controlled substance may be resentenced only to a term of years, not to a parolable or nonparolable life sentence, following mandatory probation revocation for committing a subsequent felony.

Similarly, MCR 6.933(C)(2) addresses probation revocation and resentencing of a juvenile who was convicted of first-degree murder. If a juvenile convicted of first-degree murder violates probation by being convicted of a felony or misdemeanor punishable by more than one year's imprisonment, subrule (C)(2) permits the court to resentence the juvenile only to a term of years and not to nonparolable life. The subrule expressly prohibits the court from imposing a nonparolable life sentence on the juvenile, but the rule is silent with regard to parolable life sentences. Any uncertainty suggested by (C)(2)'s express mention of nonparolable life and its silence regarding parolable life appears to be settled by the *Valentin* Court's analysis of MCL 771.7(1). Because *Valentin* interpreted the language used in MCL 771.7(1) to prohibit parolable life sentences, and because MCL 771.7(1) is also applicable to probation revocation and resentencing of a juvenile convicted of first-degree murder, MCR 6.933(C)(2) must also prohibit the imposition of parolable life sentences.*

*It should also be noted that effective January 1, 1997, juveniles convicted of first-degree murder in "automatic waiver" proceedings must be committed to the Department of Corrections. See MCL 769.1(g). Thus, application of new MCR 6.933(C)(2) will be limited to juveniles whose offenses occurred prior to January 1, 1997.

Replace the second paragraph on page 28 with the following paragraph:

If the court finds that the juvenile has violated "juvenile probation" by means other than being convicted of a felony or misdemeanor punishable by more than one year's imprisonment, new MCR 6.933(B)(2) permits the court to choose whether to continue the juvenile's probation and state wardship or to order the juvenile committed to the Department of Corrections. See also MCL 771.7(2). In addition to the juvenile's continued probation or commitment to the Department of Corrections, the court may order any of the following:

June 2003

Update: Domestic Violence Benchbook (2d ed)

Chapter 4

Promoting Safety in Criminal Proceedings

4.16 Victim Confidentiality Concerns and Court Records

B. Juvenile Delinquency Cases

Replace the text in subsection (B) on page 135 with the following:

The amended court rules effective May 1, 2003, added a new section to the list of files defined as confidential and to which only persons with a legitimate interest have access. MCR 3.903(A)(3)(b) characterizes the contents of a juvenile's social file, including victim statements, as confidential. MCR 3.903(A)(3)(b)(vi).

Under MCL 712A.28(2) and MCR 3.925(D)(1), the general rule is that all *records* in juvenile cases are open to the general public, while *confidential files* are not open to the public. MCR 3.903(24) defines "records" as the pleadings, motions, authorized petitions, notices, memorandums, briefs, exhibits, available transcripts, findings of the court, register of actions, and court orders. MCR 3.903(A)(3)(a) defines "confidential files" as all materials made confidential by statute or court rule, including:

- the separate statement about known victims of juvenile offenses as required by MCL 780.784, and
- the testimony taken during a closed proceeding pursuant to MCR 3.925(A) and MCL 712A.17(7).

"Confidential files" may only be accessed by an individual the court determines has a legitimate interest in the files. MCR 3.925(D)(2). In determining whether a person has a legitimate interest, the court must consider:

- the nature of the proceedings;

- the public's welfare and safety;
- the interest of the minor; and
- any restriction imposed by state or federal law.

The Crime Victim Rights Act, MCL 780.788(1), provides that on motion by the prosecutor or victim, victim identifying information may be protected from disclosure during testimony at any court hearing in delinquency cases, based on the victim's reasonable apprehension of acts or threats of physical violence or intimidation.

Chapter 5

Evidence in Criminal Domestic Violence Cases

5.7 "Catch-All" Hearsay Exceptions

Insert the following text on page 159, after the third full paragraph:

In *People v Katt*, ___ Mich ___ (2003), the Michigan Supreme Court considered the "catch-all" hearsay exception contained in MCR 803(24). In *Katt*, the defendant was convicted of three counts of first-degree criminal sexual conduct. The evidence admitted at trial included testimony by a social worker of statements that the seven-year old victim made to her regarding the alleged sexual abuse. Prior to the trial, the prosecutor had filed a motion to have the statements admitted under the "tender-years" rule, MRE 803A. The trial court denied the motion, but after a hearing, the court found that the statements were admissible under MRE 803(24). The defendant appealed his conviction claiming that it was error for the trial court to admit the statements under the "catch-all" exception. The defendant argued that MRE 803(24) requires that statements admitted under the hearsay exception may not be "specifically covered" by any of the categorical hearsay exceptions. Further, he argued that statements that are close to being admitted under another hearsay exception but that do not fit precisely into a recognized hearsay exception are not admissible under the residual hearsay exception. (This is commonly referred to as the "near miss" theory.) Therefore, the statements in question were inadmissible because they were "specifically covered" by the tender-years rule in MRE 803A. ___ Mich at ___.

The Michigan Supreme Court affirmed the defendant's conviction and declined to apply the "near miss" theory. The Court stated:

> "We agree with the majority of the federal courts and conclude that a hearsay statement is 'specifically covered' by another exception for purposes of MRE 803(24) only when it is admissible under that exception. Therefore, we decline to adoption the near-miss theory as part of our method for determining when hearsay statements may be admissible under MRE 803(24)." ___ Mich at ___.

Chapter 5

Evidence in Criminal Domestic Violence Cases

5.9 Privileges Arising from a Marital Relationship

B. Confidential Communications Privilege

Insert the following language before the first bulleted item on the bottom of page 169:

F *People v Dolph-Hostetter*, ___ Mich App ___ (2003):

In *Dolph-Hostetter*, the defendant, the defendant's ex-husband (Ronald Hostetter), and a third individual were arrested in 2000 for their involvement in a 1996 murder. ___ Mich App at ___. The defendant and Hostetter were married at the time of the murder but had divorced in 1997 before they were arrested. In an agreement to provide testimony against the defendant and the third individual, Hostetter pleaded guilty to second-degree murder. ___ Mich App at ___.

The defendant objected to the testimony of her ex-husband and argued that it was protected under the marital privilege as a confidential communication made between her and her spouse during their marriage. At the time of the trial, MCL 600.2162 had recently been amended and provided that the decision to testify about marital communications lies with the person testifying. Prior to the amendment, either spouse could assert the privilege. The defendant argued that this amendment, as applied to this case, amounted to an *ex post facto* law. The circuit court agreed with the defendant that retroactive application of the amended marital communications privilege in MCL 600.2162(7) would violate the prohibition against *ex post facto* laws, and the court excluded Hostetter's testimony. ___ Mich App at ___. Initially, the Michigan Supreme Court remanded the case, to the Michigan Court of Appeals and directed the Court to "address the ex post facto issue presented in [*Dolph-Hostetter*] in light of *Carmell v Texas* [citations omitted]." *People v Dolph-Hostetter*, 466 Mich 883 (2002). The Michigan Court of Appeals considered the *ex post facto* issue in light of *Carmell v Texas,* 529 US 513 (2000), and reversed the circuit court's ruling.

Carmell involved the expansion of an age-based exception to a Texas law requiring that a child-victim's allegations of a sex offense be corroborated. For the same reasons emphasized by the United States Supreme Court in *Carmell*, 529 US at 530–532, the Michigan Court of Appeals concluded that although retroactive application of the amended Texas statute violated the prohibition against *ex post facto* laws, retroactive application of Michigan's amended marital communications privilege did not constitute an *ex post facto* violation. ___ Mich App at ___. The Texas law was a clear violation of the

prohibition against *ex post facto* laws because "[the statute] essentially lowered the quantum of proof necessary to convict the accused." ___ Mich App at ___. According to the Court, the statutory amendment at issue in Michigan was dissimilar to the *Carmell* amendment in that "[t]he amendment to the marital communications privilege does not alter the quantum of evidence necessary to convict a person of any crimes; it simply affects which evidence may be introduced at a criminal trial." ___ Mich App at ___.

The Court explained that the change in evidence under MCL 600.2162(7) was limited to the quantum of evidence *admissible* without the defendant's consent; the amendment had no effect on a defendant's presumptive innocence and the amount of evidence necessary to overcome that presumption. ___ Mich App at ___. "The amended statute only renders witnesses competent to testify, if they choose, or permits the admission of evidence that previously was inadmissible. It does not make criminal any prior action not criminal when done; it does not increase the degree, severity or nature of any crime committed before its passage; it does not increase punishment for anything done before its adoption; and it does not lessen the amount or quantum of evidence that is necessary to obtain a conviction when the crime was committed." ___ Mich App at ___.

Chapter 8

Enforcing Personal Protection Orders

8.11 Enforcement Proceedings Involving a Respondent Under Age 18

Beginning with the last paragraph on page 294, replace the entire contents of Section 8.11 with the following:

Proceedings to enforce a PPO against a respondent under age 18 are governed by subchapter 3.900 of the Michigan Court Rules. MCR 3.701(A), 3.708(A)(2), and 3.982(B). The rules exclusively applicable to such proceedings are set forth at MCR 3.981–3.989. See MCR 3.901(B)(5). Procedures on appeals related to minor PPOs are governed by MCR 3.709 and 3.993.

B. Referee May Preside at Enforcement Proceedings

The court may assign a nonattorney referee to preside at a preliminary hearing for enforcement of a minor PPO. Only a referee licensed to practice law in Michigan may preside at any other hearing for the enforcement of a minor PPO and make recommended findings and conclusions. MCR 3.913(A)(2)(d).

Note: MCR 3.901(B)(1) limits the applicability of MCR 3.913 to delinquency and child protective proceedings "unless the context otherwise indicates." Although MCR 3.913(A)(2)(d) specifically mentions PPO enforcement proceedings, it is not clear whether other subparts of this court rule apply in that context:

- MCR 3.913(B) provides that a party may demand a trial by jury or by a judge pursuant to MCR 3.911 and 3.912. However, PPO proceedings are not mentioned in MCR 3.913(B). There is no right to a jury trial in minor PPO enforcement actions pursuant to MCR 3.987(D).

- MCR 3.913(C) states that if a referee conducts the proceedings, he or she must inform the parties of the right to file a request for review of the referee's recommended findings and conclusions as provided in MCR 3.991(B). The reference to "the respondent" seems to indicate that PPO enforcement proceedings are encompassed by this provision. MCR 3.901(B)(1) provides the applicability of MCR 3.991(B) to delinquency and child protective proceedings. However, MCR 3.991(B) does not indicate that it applies *only* to delinquency or child protective proceedings.

C. Initiation of Proceedings – Overview

If a respondent allegedly violates a minor personal protection order, the original petitioner, a law enforcement officer, a prosecuting attorney, a probation officer, or a caseworker may submit a written supplemental petition to have the respondent found in contempt. MCR 3.983(A). The supplemental petition must contain a specific description of the facts constituting the violation of the PPO. MCR 3.983(A). There is no fee for the supplemental petition. MCR 3.983(A).

D. Original Petitioner Initiates Proceeding by Filing a Supplemental Petition

If the original petitioner files the supplemental petition in a court other than the one that issued the minor PPO, the contempt proceeding shall be entitled "In the Matter of Contempt of [Respondent], a minor." The clerk shall provide a copy of the contempt proceeding to the issuing court. MCR 3.982(C).*

*See Section 8.7(A) on filing contempt proceedings outside the jurisdiction of the issuing court.

Upon receipt of the supplemental petition, MCR 3.983(B)(1)–(2) requires the court to either:

- Set a date for a preliminary hearing on the petition, to be held as soon as practicable, and issue a summons to appear; or
- Issue an order authorizing a peace officer or other person designated by the court to apprehend the respondent.

1. Apprehension of the Respondent

MCL 712A.2c authorizes a court to issue an order for apprehension of a minor who allegedly violates a PPO, as follows:

> "The court may issue an order authorizing a peace officer or other person designated by the court to apprehend a juvenile who is . . . alleged to have violated a personal protection order issued under [MCL 712A.2(h)] or is alleged to have violated a valid foreign protection order. The order shall set forth specifically the identity of the juvenile sought and the house, building, or other location or place where there is probable cause to believe the juvenile is to be found. A person who interferes with the lawful attempt to execute an order issued under this section is guilty of a misdemeanor punishable by imprisonment for not more than 90 days or a fine of not more than $100.00, or both."

If the court issues an order to apprehend the respondent, MCR 3.983(D)(1)(a)–(b) provides that the order may include authorization to:

- "[E]nter specified premises as required to bring the minor before the court;" and,

- "[D]etain the minor pending preliminary hearing if it appears there is a substantial likelihood of retaliation or continued violation."

An officer must immediately take the actions specified in MCR 3.984(B)(1)–(4) when the officer apprehends a minor respondent under any of the following circumstances:

- pursuant to a court order that specifies that the minor is to be brought directly to court, or
- without a court order if the officer has not obtained a written promise from the minor's parent, guardian, or custodian to bring the minor to court, or the officer believes that there is a substantial likelihood of retaliation or violation by the minor.

MCR 3.984(B)(1)–(4) requires the officer to immediately do the following:

- If the whereabouts of the respondent's parent or parents, guardian, or custodian is known, inform them of the respondent's apprehension and of his or her whereabouts, and of the need for them to be present at the preliminary hearing. MCR 3.984(B)(1).
- Take the respondent before the court for a preliminary hearing, or to a place designated by the court pending the scheduling of a preliminary hearing. MCR 3.984(B)(2).
- Prepare a custody statement for submission to the court. The statement must include: a) the grounds for and the time and location of detention; and, b) the names of persons notified and the times of notification, or the reason for failure to notify. MCR 3.984(B)(3).
- Ensure that a supplemental petition is prepared and filed with the court. MCR 3.984(B)(4).

While awaiting arrival of the parent or parents, guardian, or custodian, appearance before the court, or otherwise, a minor respondent under 17 years of age must be maintained separately from adult prisoners to prevent any verbal, visual, or physical contact with an adult prisoner. MCR 3.984(C).

If the respondent is apprehended for an alleged violation of a PPO in a jurisdiction other than the one in which the PPO was issued, the apprehending jurisdiction may notify the issuing jurisdiction that it may request the respondent's return to the issuing jurisdiction for enforcement proceedings. MCR 3.984(E).

> **Note:** MCR 3.984(E) does not specify which agency within the "apprehending jurisdiction" is responsible for providing notice. However, once the preliminary hearing has been held, MCL 764.15b(6) and MCR 3.985(H) place this responsibility upon the circuit court. See Section 8.11(F)(1). MCR 3.984(E) also makes no mention of which jurisdiction bears the costs of transportation if the issuing jurisdiction requests the respondent's return from the jurisdiction where he or she

was apprehended. Where notice is provided by the circuit court under MCL 764.15b(6), the issuing jurisdiction bears this expense.

2. Service of Supplemental Petition and Summons on Respondent

If the court sets a date for a preliminary hearing, the petitioner must serve the supplemental petition and the summons on the respondent and, if the relevant addresses are known or ascertainable upon diligent inquiry, on the respondent's parent or parents, guardian, or custodian. Service must be made as provided in MCR 3.920 at least seven days before the preliminary hearing. MCR 3.983(C).

MCR 3.920(B)(2)(c) provides:

> "In a personal protection order enforcement proceeding involving a minor respondent, a summons must be served on the minor. A summons must also be served on the parent or parents, guardian, or legal custodian, unless their whereabouts remain unknown after a diligent inquiry."

MCR 3.920(B)(4) provides for the manner of service as follows:

> "(a) Except as provided in subrule (B)(4)(b), a summons required under subrule (B)(2) must be served by delivering the summons to the party personally.
>
> "(b) If the court finds, on the basis of testimony or a motion and affidavit, that personal service of the summons is impracticable or cannot be achieved, the court may by ex parte order direct that it be served in any manner reasonably calculated to give notice of the proceedings and an opportunity to be heard, including publication.
>
> "(c) If personal service of a summons is not required, the court may direct that it be served in a manner reasonably calculated to provide notice."

The summons must direct the person to whom it is addressed to appear at a time and place specified by the court. MCR 3.920(B)(3). The summons must also:

- Identify the nature of the hearing. MCR 3.920(B)(3)(a).
- Explain the right to an attorney and the right to trial by judge. MCR 3.920(B)(3)(b). (There is no right to a jury trial in contempt proceedings for an alleged PPO violation. MCR 3.987(D).)
- Have a copy of the petition attached. MCR 3.920(B)(3)(d).

E. Proceedings Initiated by Apprehension of Respondent Without a Court Order

MCL 712A.14(1) authorizes apprehension of a minor respondent for an alleged violation of a PPO as follows:

> "Any local police officer, sheriff or deputy sheriff, state police officer, county agent or probation officer of any court of record may, without the order of the court, immediately take into custody any child . . . for whom there is reasonable cause to believe is violating or has violated a personal protection order issued pursuant to [MCL 712A.2(h)] by the court under [MCL 600.2950 and MCL 600.2950a], or for whom there is reasonable cause to believe is violating or has violated a valid foreign protection order."

*See Section 8.5(A) on how the existence of a PPO may be verified.

MCL 712A.14(1) makes no mention of the PPO statutes' provisions for oral notice at the scene of an alleged PPO violation in situations where a minor respondent has not been served with the PPO or received notice of it. The oral notice provisions in the PPO statutes refer to MCL 712A.14 as if it were a separate proceeding; MCL 600.2950(22) and MCL 600.2950a(19) state that "[t]his subsection does not preclude . . . a proceeding under [MCL 712A.14]." The Advisory Committee for this chapter of the benchbook suggests that in the absence of alternative specific oral notice procedures for minor respondents, it is consistent with due process to apply the notice provisions of MCL 600.2950(22) and MCL 600.2950a(19) in cases involving minor respondents. The Committee notes that a PPO is immediately enforceable anywhere in Michigan by any law enforcement agency that has verified the existence of the order. MCL 600.2950(21) and MCL 600.2950a(18).* This immediate enforceability applies to PPOs issued against a minor respondent, regardless of whether the respondent or his or her parent, guardian, or custodian has received notice of the PPO. MCL 600.2950(18) and MCL 600.2950a(15). Thus, the oral notice provisions in the PPO statutes are necessary in all cases to give effect to the immediate enforceability of a PPO consistent with due process. On due process concerns with PPOs, see *Kampf v Kampf*, 237 Mich App 377, 383–385 (1999), discussed at Section 7.5(A). See also MCR 5.982(A), which states that "[a] minor personal protection order is enforceable under MCL 600.2950(22), (25) and MCL 600.2950a(19), (22)."

Once a minor respondent has been apprehended without a court order, the apprehending officer may warn and release the minor. MCR 3.984(A). If the minor is taken into custody, MCL 712A.14(1) and MCR 3.984 provide for the following procedures:

- The apprehending officer shall immediately attempt to notify the parent or parents, guardian, or custodian.

- While awaiting the arrival of the parent or parents, guardian, or custodian, a child under the age of 17 years shall not be held in any detention facility unless the child is completely isolated so as to prevent any verbal, visual, or physical contact with any adult prisoner.

- Unless the child requires immediate detention as provided for in the Juvenile Code, the officer shall accept the written promise of the parent or parents, guardian, or custodian to bring the child to the court at a time fixed therein. The child shall then be released to the custody of the parent or parents, guardian, or custodian. In the context of PPO enforcement proceedings, detention is authorized under the Juvenile Code when the respondent has "allegedly violated a personal protection order and . . . it appears there is a substantial likelihood of retaliation or continued violation." MCL 712A.15(2)(f).

The court must designate a judge, referee or other person who may be contacted by the officer taking a minor under age 17 into custody when the court is not open. In each county there must be a designated facility open at all times at which an officer may obtain the name of the person to be contacted for permission to detain the minor pending preliminary hearing. MCR 3.984(D).

If the respondent is apprehended for an alleged violation of a PPO in a jurisdiction other than the one in which the PPO was issued, the apprehending jurisdiction may notify the issuing jurisdiction that it may request the respondent's return to the issuing jurisdiction for enforcement proceedings. MCR 3.984(E).

> **Note:** MCR 3.984(E) does not specify which agency within the "apprehending jurisdiction" is responsible for providing notice. However, once the preliminary hearing has been held, MCL 764.15b(6) and MCR 3.985(H) place this responsibility upon the circuit court. See Section 8.11(F)(1). MCR 3.984(E) also makes no mention of which jurisdiction bears the costs of transportation if the issuing jurisdiction requests the respondent's return from the jurisdiction where he or she was apprehended. Where notice is provided by the circuit court under MCL 764.15b(6) the issuing jurisdiction bears this expense.

If the supplemental petition is filed in a court other than the one that issued the minor PPO, the contempt proceeding shall be entitled "In the Matter of Contempt of [Respondent], a minor." The clerk shall provide a copy of the contempt proceeding to the issuing court. MCR 3.982(C).

F. Preliminary Hearings

1. Place for Preliminary Hearing

A preliminary hearing (as well as a violation hearing) on an alleged PPO violation may take place in either the issuing jurisdiction or the jurisdiction where a minor respondent was apprehended. MCL 764.15b(6) provides:

> "The family division of circuit court has jurisdiction to conduct contempt proceedings based upon a violation of a personal protection order issued pursuant to [MCL 712A.2(h)], by the family division of circuit court in any county of this state or a valid foreign protection order issued against a respondent who is less than 18 years of age at the time of the alleged violation of the foreign protection order in this state. The family division of circuit court that conducts the preliminary inquiry shall notify the court that issued the personal protection order or foreign protection order that the issuing court may request that the respondent be returned to that county for violating the personal protection order or foreign protection order. If the court that issued the personal protection order or foreign protection order requests that the respondent be returned to that court to stand trial, the county of the requesting court shall bear the cost of transporting the respondent to that county."

*A similar optional notice provision applies at the time the minor is apprehended. See MCR 3.984(E).

See also MCR 3.985(H), which provides that if a minor respondent is apprehended for an alleged PPO violation in a jurisdiction other than the one in which the PPO was issued, and the apprehending jurisdiction conducts the preliminary hearing, if it has not already done so, the apprehending jurisdiction must immediately notify the issuing jurisdiction that the latter may request that the respondent be returned to the issuing jurisdiction for enforcement proceedings.*

2. Time for Preliminary Hearing

- *Respondent not detained:* If the minor respondent was not taken into court custody or jailed for an alleged PPO violation, "the preliminary hearing must commence as soon as practicable after the apprehension or arrest, or the submission of a supplemental petition by the original petitioner." MCR 3.985(A)(1).

- *Respondent detained:* If the minor respondent was apprehended with or without a court order for an alleged PPO violation and was taken into court custody or jailed, "the preliminary hearing must commence no later than 24 hours after the minor was apprehended or arrested, excluding Sundays and holidays as defined in MCR 8.110(D)(2), or the minor must be released." MCR 3.985(A)(1).

The court may adjourn the hearing for up to 14 days to secure the attendance of witnesses or the minor's parent, guardian, or custodian or for other good cause shown. MCR 3.985(A)(2).

3. Required Procedures at Preliminary Hearing

The court shall determine whether the parent, guardian, or custodian has been notified and is present. The preliminary hearing may be conducted without a parent, guardian, or custodian if a guardian ad litem or attorney appears with the minor. MCR 3.985(B)(1). A court may appoint a guardian ad litem for a

minor involved as a respondent in a PPO proceeding under MCL 712A.2(h). See MCL 712A.17c(10), which provides:

> "To assist the court in determining a child's best interests, the court may appoint a guardian ad litem for a child involved in a proceeding under [chapter 12A of the Juvenile Code]."

See also MCR 3.916(A), which provides that "[t]he court may appoint a guardian ad litem for a party if the court finds that the welfare of the party requires it." This court rule applies to delinquency and child protective proceedings (MCR 3.901(B)(1)), and appears to apply to PPO enforcement proceedings by virtue of MCR 3.985(B)(1). A guardian ad litem is an officer of the court, not a representative of a party. A guardian ad litem may be called as a witness in the proceeding.

Unless waived by the respondent, the court shall read the allegations in the supplemental petition and ensure that the respondent has received written notice of the alleged violation. MCR 3.985(B)(2). Immediately after reading the allegations, the court shall advise the respondent on the record in plain language of the following rights listed in MCR 3.985(B)(3):

- The respondent may contest the allegations at a violation hearing.
- The respondent has the right to an attorney at every stage in the proceedings. If the court determines that it might sentence the respondent to jail or place the respondent in secure detention, the court will appoint an attorney at public expense if the respondent wants one and is financially unable to retain one.
- The respondent has the right to a non-jury trial.
- A referee may be assigned to hear the case unless demand for a judge is filed in accordance with MCR 3.912.
- The respondent may have witnesses against him or her appear at a violation hearing. The respondent may question the witnesses.
- The respondent may have the court order that any witnesses for his or her defense must appear at the hearing.
- The respondent has the right to remain silent, and to not have his or her silence used against him or her.
- Any statement the respondent makes may be used against him or her.

At the preliminary hearing, the court must decide whether to authorize the filing of the supplemental petition and proceed formally, or to dismiss the supplemental petition. MCR 3.985(B)(4).

> **Note:** MCR 3.985(B)(4) does not mention proceedings on the consent calendar or alternative services under the Juvenile Diversion Act.*

*MCL 722.821 et seq.

Compare MCR 3.935(B), which provides for these options in delinquency proceedings.

If the court authorizes filing of the supplemental petition, MCR 3.985(B)(6) requires the following:

- The court must set a date and time for the violation hearing, or, if the court accepts a plea of admission or no contest, either enter a dispositional order, or set the matter for dispositional hearing; and
- The court must either release the respondent subject to conditions or order detention of the respondent pending the violation hearing.*

*See Section 8.11(F)(4)–(5) on release conditions and detention.

At the preliminary hearing, the court must state the reasons for its decision to release or detain the minor, on the record or in a written memorandum. MCR 3.985(G).

*See Section 8.11(F)(6).

The court must allow the respondent the opportunity to deny or otherwise plead to the allegations of the supplemental petition. If the respondent wants to enter a plea of admission or nolo contendere, the court shall follow MCR 3.986.* MCR 3.985(B)(5).

If the respondent denies the allegations in the supplemental petition, the court must make the following notices after the preliminary hearing, as required by MCR 3.985(C):

- Notify the prosecuting attorney of the scheduled violation hearing.
- Notify the respondent, respondent's attorney, if any, and respondent's parents, guardian, or custodian of the scheduled violation hearing, and direct the parties to appear at the hearing and give evidence on the contempt charges.
- Notice of hearing must be given by personal service or ordinary mail at least seven days before the violation hearing, unless the respondent is detained, in which case notice of hearing must be served at least 24 hours before the hearing.

4. Release of Respondent Subject to Conditions Pending Violation Hearing

MCR 3.985(E) governs the conditional release of a respondent to a parent, guardian, or custodian pending the resumption of the preliminary hearing or pending the violation hearing. In setting release conditions, the court must consider available information on the following factors set forth in this court rule:

- Family ties and relationships;
- The respondent's prior juvenile delinquency or minor PPO record, if any;

- The respondent's record of appearance or nonappearance at court proceedings;
- The violent nature of the alleged violation;
- The respondent's prior history of committing acts that resulted in bodily injury to others;
- The respondent's character and mental condition;
- The court's ability to supervise the respondent if placed with a parent or relative;
- The likelihood of retaliation or violation of the PPO by the respondent; and
- Any other factor indicating the respondent's ties to the community, the risk of nonappearance, and the danger to the respondent or the original petitioner if the respondent is released.

Bail procedure is the same as in juvenile delinquency proceedings. See MCR 3.935(F).

See Sections 4.5–4.6 for a general discussion of safety concerns with conditional release in cases involving allegations of domestic violence.

5. Detention Pending Violation Hearing

MCL 712A.15(2) provides as follows:

> "Custody, pending hearing, is limited to the following children:
>
> > "(a) Those whose home conditions make immediate removal necessary.
> >
> > "(b) Those who have a record of unexcused failures to appear at juvenile court proceedings.
> >
> > "(c) Those who have run away from home.
> >
> > "(d) Those who have failed to remain in a detention or nonsecure facility or placement in violation of a court order.
> >
> > "(e) Those whose offenses are so serious that release would endanger public safety.
> >
> > "(f) Those who have allegedly violated a personal protection order and for whom it appears there is a substantial likelihood of retaliation or continued violation."

MCR 3.985(F)(1) prohibits removal of a minor from his or her parent, guardian, or custodian pending a PPO violation hearing or further court order unless the following circumstances exist:

> "(a) probable cause exists to believe the minor violated the minor personal protection order; and
>
> "(b) at the preliminary hearing, the court finds one or more of the following circumstances to be present:
>
> > "(i) there is a substantial likelihood of retaliation or continued violation by the minor who allegedly violated the minor personal protection order;
> >
> > "(ii) there is a substantial likelihood that if the minor is released to the parent, with or without conditions, the minor will fail to appear at the next court proceeding; or
> >
> > "(iii) detention pending violation hearing is otherwise specifically authorized by law."

A minor in custody may waive the probable cause phase of a detention determination only if the minor is represented by an attorney. MCR 3.985(F)(2).

At the preliminary hearing, the respondent may contest the sufficiency of evidence to support detention by cross-examination of witnesses, presentation of defense witnesses, or other evidence. The court shall permit the use of subpoena power to secure attendance of defense witnesses. A finding of probable cause may be based on hearsay evidence that possesses adequate guarantees of trustworthiness. MCR 3.985(F)(3).

A respondent who is detained must be placed in the least restrictive environment that will meet the needs of the respondent and the public, and that conforms to the requirements of MCL 712A.15 and 712A.16. MCR 3.985(F)(4).

Regarding the environment for detention in cases involving alleged PPO violations, MCL 712A.15 provides as follows, in pertinent part:

> "(3) A child taken into custody pursuant to section 2(a)(2) to (4) of this chapter [governing status offenses] or subsection (2)(c) [regarding runaways] shall not be detained in any secure facility designed to physically restrict the movements and activities of alleged or adjudicated juvenile offenders unless the court finds that the child willfully violated a court order and the court finds, after a hearing and on the record, that there is not a less restrictive alternative more appropriate to the needs of the child. This subsection does not apply to a child who is under the jurisdiction

> of the court pursuant to section 2(a)(1) of this chapter or a child who is not less than 17 years of age and who is under the jurisdiction of the court pursuant to a supplemental petition under section 2(h) of this chapter.
>
> * * *
>
> "(5) A child taken into custody pursuant to section 2(a)(2) to (4) of this chapter or subsection (2)(c) shall not be detained in a cell or other secure area of any secure facility designed to incarcerate adults unless either of the following applies:
>
> > "(a) A child is under the jurisdiction of the court pursuant to section 2(a)(1) of this chapter [governing delinquency cases] for an offense which, if committed by an adult, would be a felony.
> >
> > "(b) A child is not less than 17 years of age and is under the jurisdiction of the court pursuant to a supplemental petition under section 2(h) of this chapter [governing minor PPOs]."

MCL 712A.15(5)(b) is consistent with provisions of the PPO statutes that impose adult penalties on persons age 17 and over who violate a PPO. See MCL 600.2950(23) and MCL 600.2950a(20). It is also consistent with provisions governing detention conditions for persons age 17 and over who have been apprehended without a court order for an alleged PPO violation. See Section 8.11(E).

MCL 712A.16 provides as follows:

> "(1) If a juvenile under the age of 17 years is taken into custody or detained, the juvenile shall not be confined in any police station, prison, jail, lock-up, or reformatory or transported with, or compelled or permitted to associate or mingle with, criminal or dissolute persons. However, except as otherwise provided in section 15(3), (4), and (5) of this chapter [subsections 15(3) and (5) are cited above; 15(4) concerns abuse/neglect and delinquency proceedings], the court may order a juvenile 15 years of age or older whose habits or conduct are considered a menace to other juveniles, or who may not otherwise be safely detained, placed in a jail or other place of detention for adults, but in a room or ward separate from adults and for not more than 30 days, unless longer detention is necessary for the service of process."*

*See also MCL 764.27a(2) (juveniles confined in a jail or other adult place of detention must be in a room or ward out of sight and sound of adults).

MCL 712A.16(2) provides in pertinent part that the court or court-approved agency may arrange for the boarding of juveniles in any of the following:

- A child caring institution or child placing agency licensed by the department of consumer and industry services to receive for care juveniles within the court's jurisdiction.
- If in a room or ward separate and apart from adult criminals, the county jail for juveniles over 17 years of age within the court's jurisdiction.

6. Plea of Admission or No Contest

*See Section 8.6(E) for a guilty plea script developed for adult proceedings.

A minor may offer a plea of admission or no contest to the violation of a minor PPO with the court's consent. The court shall not accept a plea to a violation unless it is satisfied that the plea is accurate, voluntary, and understanding. MCR 3.986(A).*

The court may accept a plea of admission or no contest conditioned on preservation of an issue for appellate review. MCR 3.986(B).

The court shall inquire of the parents, guardian, custodian, or guardian ad litem whether there is any reason the court should not accept the plea tendered by the minor respondent. Agreement or objection by the parent, guardian, custodian, or guardian ad litem to a minor's plea of admission or no contest must be placed on the record if that person is present. MCR 3.986(C).

The court may take a plea of admission or no contest under advisement. Before the court accepts the plea, the minor may withdraw the plea offer by right. After the court accepts the plea, the court has discretion to allow the minor to withdraw the plea. MCR 3.986(D).

7. Respondent Fails to Appear at Preliminary Hearing

If the respondent was notified of the preliminary hearing and fails to appear for it, the court may issue an order to apprehend the respondent. MCR 3.985(D). This order is to be issued in accordance with MCR 3.983(D), which is discussed at Section 8.11(D)(1). MCR 3.985(D) further provides that:

- If the respondent is under age 17, the court may order him or her to be detained pending a hearing on the apprehension order. If the court releases the respondent, it *may* set bond for the respondent's appearance at the violation hearing.
- If the respondent is 17 years old, the court may order him or her to be confined to jail pending a hearing on the apprehension order. If the court releases the respondent, it *must* set bond for the respondent's appearance at the violation hearing.

G. Violation Hearing

1. Time for Hearing

MCR 3.987(A) provides that upon completion of the preliminary hearing, the court shall set a date and time for the violation hearing, if the respondent denies the allegations in the supplemental petition. This rule further provides the following limits for holding the violation hearing:

- If the respondent is detained, the hearing must be held within 72 hours of apprehension, excluding Sundays and holidays.
- If the respondent is not detained, the hearing must be held within 21 days.

2. Role of Prosecuting Attorney at Violation Hearing

MCL 764.15b(7) generally provides that the prosecuting attorney shall prosecute the criminal contempt proceeding unless the petitioner retains his or her own attorney for that purpose, or "the prosecuting attorney determines that the personal protection order was not violated or that it would not be in the interest of justice to prosecute the criminal contempt violation." This provision specifically applies to all enforcement proceedings against respondents age 18 and older, whether the proceedings were initiated by warrantless arrest or by motion to show cause. *Id*.

In cases involving a PPO with a respondent under age 18, MCR 3.987(B) provides: "If a criminal contempt proceeding is commenced under MCL 764.15b, the prosecuting attorney shall prosecute the proceeding unless the petitioner retains an attorney to prosecute the criminal contempt proceeding. If the prosecuting attorney determines that the personal protection order was not violated or that it would not be in the interest of justice to prosecute the criminal contempt violation, the prosecuting attorney need not prosecute the proceeding." Because proceedings under the statute are "commenced" by way of warrantless arrest, it is not clear whether the prosecutor is required under the court rule to prosecute an action against a minor respondent initiated by filing a supplemental petition. MCL 764.15b(7) requires the prosecutor to prosecute in corresponding adult show cause proceedings; an argument that this provision should apply in cases initiated by supplemental petition could be based on these authorities:

- PPOs with respondents under age 17 are referenced in MCL 764.15b(1)(c), which requires the PPO to state on its face the penalties for violation as a prerequisite to warrantless arrest.
- MCL 712A.2(h) states that the family division of circuit court has jurisdiction over "a proceeding *under* [the PPO statutes, MCL 600.2950 and MCL 600.2950a], in which a minor less than 18 years of age is the respondent." [Emphasis added.] The PPO statutes specifically state that a PPO is enforceable under MCL 764.15b. See MCL 600.2950(25) and MCL 600.2950a(22).

- MCR 3.982(A) states that "[a] minor personal protection order is enforceable under...MCL 764.15b."

3. Preliminary Matters

There is no right to a jury trial at PPO violation hearings with a minor respondent. MCR 3.987(D).

The respondent has the right to be present at the hearing, to present evidence, and to examine and cross-examine witnesses. MCR 3.987(E).

At the violation hearing, the court must do all of the following:

- Determine whether the appropriate parties have been notified and are present. The respondent has the right to be present at the violation hearing along with parents, guardian, or custodian, and guardian ad litem and attorney. The court may proceed in the absence of a parent properly noticed to appear, provided the respondent is represented by an attorney. The original petitioner also has the right to be present at the violation hearing. MCR 3.987(C)(1).
- Read the allegations in the supplemental petition, unless waived. MCR 3.987(C)(2).
- Inform the respondent of the right to the assistance of an attorney, unless legal counsel appears with the respondent. MCR 3.987(C)(3).
- Inform the respondent that if the court determines it might sentence the respondent to jail or place him or her in secure detention, the court will appoint an attorney at public expense if the respondent wants one and is financially unable to retain one. If the respondent requests to proceed without the assistance of an attorney, the court must advise him or her of the dangers and disadvantages of self-representation, and make sure the respondent is literate and competent to conduct the defense. *Id.*

4. Evidence and Burden of Proof

The rules of evidence apply to both criminal and civil contempt proceedings. MCR 3.987(F).

The petitioner or prosecuting attorney has the burden of proving the respondent's guilt of criminal contempt beyond a reasonable doubt, and the respondent's guilt of civil contempt by a preponderance of the evidence. *Id.*

5. Judicial Findings

At the conclusion of the hearing, the court must make specific findings of fact, state separately its conclusions of law, and direct entry of the appropriate judgment. The court must state its findings and conclusions on the record or in a written opinion made a part of the record. MCR 3.987(G).

H. Dispositional Hearing

1. Time Limitations

MCR 3.988(A) provides the following time intervals between the entry of a judgment finding a violation of a minor PPO and any disposition:

- If the minor is not detained, the time interval may not be more than 35 days.
- If the minor is detained, the time interval may not exceed 14 days, except for good cause.

2. Conduct of Dispositional Hearing

The petitioner has the right to be present at the dispositional hearing. MCR 3.988(B)(2). The respondent may be excused from part of the dispositional hearing for good cause, but must be present when the disposition is announced. MCR 3.988(B)(1).

At the dispositional hearing, the court may receive all relevant and material evidence, including oral and written reports. The court may rely on such evidence to the extent of its probative value, even though it may not be admissible at the violation hearing. MCR 3.988(C)(1).

The respondent or his or her attorney and the petitioner shall be afforded an opportunity to examine and controvert written reports received by the court. In the court's discretion, they may also be allowed to cross-examine individuals making reports when such individuals are reasonably available. MCR 3.988(C)(2).

No assertion of an evidentiary privilege, other than the privilege between attorney and client, shall prevent the receipt and use at the dispositional phase of material prepared pursuant to a court-ordered examination, interview, or course of treatment. MCR 3.988(C)(3).

I. Dispositions

1. Respondent 17 Years of Age or Older

MCL 600.2950(23) provide for criminal contempt sanctions as follows:

> "An individual who is 17 years of age or more and who refuses or fails to comply with a personal protection order under this section is subject to the criminal contempt powers of the court and, if found guilty, *shall* be imprisoned for not more than 93 days and may be fined not more than $500.00." [Emphasis added.]

Note: MCR 3.988(D)(1) states that the court "may" impose a 93-day prison sentence. Since the penalty for a PPO violation is arguably not a

matter of "practice and procedure," the Advisory Committee for this chapter of the benchbook suggests that the statutory provision should control. See MCR 1.103. On the nature of criminal contempt, see Section 8.3.(A). On probation as a dispositional alternative for a PPO violation, see Section 8.9(A). On awards to compensate for a petitioner's actual losses caused by the PPO violation, see Section 8.9(C).

Respondents imprisoned under the foregoing provisions may be committed to a county jail within the adult prisoner population. MCL 712A.18(1)(e).

MCR 3.988(D)(2)(a) provides for civil contempt sanctions as follows:

> "(2) If a minor respondent pleads or is found guilty of civil contempt, the court shall
>
> > "(a) impose a fine or imprisonment as specified in MCL 600.1715 and 600.1721, if the respondent is at least 17 years of age."

See Section 8.9(B)–(C) on sanctions under the statutes cross-referenced in MCR 3.988(D)(2)(a).

In addition to the foregoing sanctions, the court may impose other conditions to the minor PPO as part of the disposition. MCR 3.988(D)(3).

2. Respondent Under Age 17

MCL 600.2950(23) and MCL 600.2950a(20) provide for sanctions against respondents under age 17 who violate a PPO as follows:

> "An individual who is less than 17 years of age who refuses or fails to comply with a personal protection order issued under this section is subject to the dispositional alternatives listed in [MCL 712A.18]."

MCR 3.988(D) makes no provision for criminal contempt sanctions against a minor respondent under age 17. Consistent with the PPO statutes, however, MCR 3.988(D)(2)(b) subjects such respondents to the dispositional alternatives under the Juvenile Code, as follows:

> "(2) If a minor respondent pleads or is found guilty of civil contempt, the court shall . . .
>
> > "(b) subject the respondent to the dispositional alternatives listed in MCL 712A.18, if the respondent is under 17 years of age."

Minor respondents in PPO actions are subject to the contempt powers of the court. See MCL 712A.26, which provides: "The court shall have the power to punish for contempt of court under [MCL 600.1701 to 600.1745], any person

who willfully violates, neglects, or refuses to obey and perform any order or process the court has made or issued to enforce this chapter."

In addition to the foregoing sanctions, the court may impose other conditions to the minor PPO as part of the disposition. MCR 3.988(D)(3).

3. Dispositional Alternatives Under the Juvenile Code

In cases involving violation of a PPO, MCL 712A.18 provides the following dispositional alternatives, to be ordered as "appropriate for the welfare of the juvenile and society in view of the facts proven and ascertained":

> "(a) Warn the juvenile or the juvenile's parents, guardian, or custodian and, except as provided in subsection (7) [governing restitution], dismiss the petition.
>
> "(b) Place the juvenile on probation, or under supervision in the juvenile's own home or in the home of an adult who is related to the juvenile. As used in this subdivision, "related" means being a parent, grandparent, brother, sister, stepparent, stepsister, stepbrother, uncle, or aunt by marriage, blood, or adoption. The court shall order the terms and conditions of probation or supervision, including reasonable rules for the conduct of the parents, guardian, or custodian, if any, as the court determines necessary for the physical, mental, or moral well-being and behavior of the juvenile.
>
> "(c) If a juvenile is within the court's jurisdiction under section 2(a) of this chapter [governing delinquency cases], or under section 2(h) of this chapter for a supplemental petition [governing PPO violations], place the juvenile in a suitable foster care home subject to the court's supervision. . . .
>
> "(d) Except as otherwise provided in this subdivision, place the juvenile in or commit the juvenile to a private institution or agency approved or licensed by the department of consumer and industry services for the care of juveniles of similar age, sex, and characteristics. If the juvenile is not a ward of the court, the court shall commit the juvenile to the family independence agency or, if the county is a county juvenile agency, to that county juvenile agency for placement in or commitment to such an institution or agency as the family independence agency or county juvenile agency determines is most appropriate, subject to any initial level of placement the court designates.
>
> "(e) Except as otherwise provided in this subdivision, commit the juvenile to a public institution, county facility, institution operated as an agency of the court or county, or agency authorized by law to receive juveniles of similar age, sex, and characteristics. If the juvenile is not a ward of the court, the court shall commit the

juvenile to the family independence agency or, if the county is a county juvenile agency, to that county juvenile agency for placement in or commitment to such an institution or facility as the family independence agency or county juvenile agency determines is most appropriate, subject to any initial level of placement the court designates. If a child is not less than 17 years of age and is in violation of a personal protection order, the court may commit the child to a county jail within the adult prisoner population. In a placement under subdivision (d) or a commitment under this subdivision, except to a state institution or a county juvenile agency institution, the juvenile's religious affiliation shall be protected by placement or commitment to a private child-placing or child-caring agency or institution, if available. Except for commitment to the family independence agency or a county juvenile agency, an order of commitment under this subdivision to a state institution or agency described in the youth rehabilitation services act, [MCL 803.301 to 803.309], or in [MCL 400.201 to 400.214], the court shall name the superintendent of the institution to which the juvenile is committed as a special guardian to receive benefits due the juvenile from the government of the United States. An order of commitment under this subdivision to the family independence agency or a county juvenile agency shall name that agency as a special guardian to receive those benefits. The benefits received by the special guardian shall be used to the extent necessary to pay for the portions of the cost of care in the institution or facility that the parent or parents are found unable to pay.

"(f) Provide the juvenile with medical, dental, surgical, or other health care, in a local hospital if available, or elsewhere, maintaining as much as possible a local physician-patient relationship, and with clothing and other incidental items the court determines are necessary.

"(g) Order the parents, guardian, custodian, or any other person to refrain from continuing conduct that the court determines has caused or tended to cause the juvenile to come within or to remain under this chapter or that obstructs placement or commitment of the juvenile by an order under this section.

"(h) Appoint a guardian under section 5204 of the estates and protected individuals code, 1998 PA 386, MCL 700.5204, in response to a petition filed with the court by a person interested in the juvenile's welfare. If the court appoints a guardian as authorized by this subdivision, it may dismiss the petition under this chapter.

"(i) Order the juvenile to engage in community service.

> "(j) If the court finds that a juvenile has violated a municipal ordinance or a state or federal law, order the juvenile to pay a civil fine in the amount of the civil or penal fine provided by the ordinance or law. Money collected from fines levied under this subsection shall be distributed as provided in [MCL 712A.29].
>
> "(k) Order the juvenile to pay court costs. Money collected from costs ordered under this subsection shall be distributed as provided in [MCL 712A.29]."

Three of the dispositional alternatives listed in MCL 712A.18(1)(*l*)–(n) do not apply to PPO violators. These are: boot camp, parental participation in treatment, and imposition of a sentence that could have been imposed on an adult for the same offense.

4. Orders for Reimbursement to the Court

MCL 712A.18(2) provides that an order of disposition placing a juvenile in or committing a juvenile to care outside of his or her own home and under state or court supervision *shall* contain a provision for reimbursement by the juvenile, parent, guardian, or custodian to the court for the cost of care or service. If the court places the juvenile in his or her own home, it *may* order such reimbursement. MCL 712A.18(3). For more information about these provisions, see Miller, *Juvenile Justice Benchbook: Delinquency & Criminal Proceedings (Revised Edition)* (MJI, 2003) Sections 11.2–11.3.

If the court appoints an attorney to represent a juvenile, parent, guardian, or custodian, the court may require in an order that the juvenile, parent, guardian, or custodian reimburse the court for attorney fees. MCL 712A.18(5).

> **Note:** MCL 712A.18(4) provides for the efficacy of orders directed to a parent or person other than the minor:
>
> > "An order directed to a parent or a person other than the juvenile is not effective and binding on the parent or other person unless opportunity for hearing is given by issuance of summons or notice as provided in [MCL 712A.12 and 712A.13] and until a copy of the order, bearing the seal of the court, is served on the parent or other person as provided in [MCL 712A.13]."

5. Orders for Restitution

Under the general contempt provisions of the Revised Judicature Act, the court must order an individual convicted of contempt to pay compensation for the injury caused by his or her behavior. See MCL 600.1721 discussed at Section 8.9(C).

> **Note:** Minor respondents in PPO actions are subject to the contempt powers of the court. See MCL 712A.26 which provides: "The court shall have the power to punish for contempt of court under [MCL 600.1701 to 600.1745], any person who willfully violates, neglects, or refuses to

> obey and perform any order or process the court has made or issued to enforce this chapter."

Restitution provisions are also found in MCL 712A.18(7) and 712A.30 for "juvenile offense[s]," which are defined as "violation[s] by a juvenile of a penal law of this state or a violation of an ordinance of a local unit of government of this state punishable by imprisonment or by a fine that is not a civil fine." MCL 712A.30(1). The applicability of these provisions in PPO enforcement proceedings is unclear. For more information about these provisions, see Miller, *Juvenile Justice Benchbook: Delinquency & Criminal Proceedings (Revised Edition)* (MJI, 2003).

6. Supplemental Dispositions

MCR 3.989 provides that when a minor placed on probation for violation of a minor PPO has allegedly violated a condition of probation, the court shall follow the procedures for supplemental disposition provided in MCR 3.944, which applies to delinquency proceedings. For more information about such proceedings, see Miller, *Juvenile Justice Benchbook: Delinquency & Criminal Proceedings (Revised Edition)* (MJI, 2003).

J. Appeals

Appeals related to minor PPOs must comply with both MCR 3.709 and 3.993. MCR 3.709(C) provides:

> "(C) From Finding After Violation Hearing.
>
> > "(1) The respondent has an appeal of right from a sentence for criminal contempt entered after a contested hearing.
> >
> > "(2) All other appeals concerning violation proceedings are by application for leave."

MCR 3.993 provides, in pertinent part:

> "(A) The following orders are appealable to the Court of Appeals by right:
>
> > "(1) an order of disposition placing a minor under the supervision of the court or removing the minor from the home,
> >
> > "(2) an order terminating parental rights,
> >
> > "(3) any order required by law to be appealed to the Court of Appeals, and
> >
> > "(4) any final order.

"(B) All orders not listed in subrule (A) are appealable to the Court of Appeals by leave.

"(C) Except as modified by this rule, chapter 7 of the Michigan Court Rules governs appeals from the family division of the circuit court. . . ."

CHAPTER 12

Domestic Violence and Access to Children

12.9 Civil Remedies to Enforce Michigan Parenting Time Orders

Replace the second paragraph on the bottom of page 441 and the bulleted items on the top of page 442 with the following text:

Effective June 1, 2003, MCL 552.511 was amended by 2002 PA 571. MCL 552.511(1) provides that the Friend of the Court must initiate one or more support enforcement measures under the Support and Parenting Time Enforcement Act, MCL 552.601 et seq., when one of the following applies:

> "(a) Except as otherwise provided in this subdivision, the arrearage under the support order is equal to or greater than the monthly amount of support payable under the order. If the support order was entered ex parte, an office shall not initiate enforcement under this subdivision until the office receives a copy of proof of service for the order and at least 1 month has elapsed since the date of service. An office is not required to initiate enforcement under this subdivision if 1 or more of the following circumstances exist:
>
> > (i) Despite the existence of the arrearage, an order of income withholding is effective and payment is being made under the order of income withholding in the amount required under the order.
> >
> > (ii) Despite the existence of the arrearage and even though an order of income withholding is not effective, payment is being made in the amount required under the order.
> >
> > (iii) One or more support enforcement measures have been initiated and an objection to 1 or more of those measures has not been resolved.
>
> "(b) A parent fails to obtain or maintain health care coverage for the parent's child as ordered by the court. The office shall initiate enforcement under this subdivision at the following times:
>
> > (i) Within 60 days after the entry of a support order containing health care coverage provisions.
> >
> > (ii) When a review is conducted as provided in section 17.
> >
> > (iii) Concurrent with enforcement initiated by the office under subdivision (a).

(iv) Upon receipt of a written complaint from a party.

(v) Upon receipt of a written complaint from the department if the child for whose benefit health care coverage is ordered is a recipient of public assistance or medical assistance.

"(c) A person legally responsible for the actual care of a child incurs an uninsured health care expense and submits to the office a written complaint that meets the requirements of section 11a."

For purposes of support enforcement measures, an arrearage amount that arises at the moment a court issues an order imposing or modifying support must not be considered as an arrearage, unless the payer fails to become current within two months after the entry of the order. MCL 552.511(2).

June 2003

Update: Friend of the Court Domestic Violence Resource Book

CHAPTER 4

Custody and Parenting Time

4.10 Civil Remedies to Enforce Parenting Time Orders

Replace the second paragraph in Section 4.10 on page 124 with the following text:

Effective June 1, 2003, MCL 552.511 was amended by 2002 PA 571. MCL 552.511(1) provides that the Friend of the Court must initiate one or more support enforcement measures under the Support and Parenting Time Enforcement Act, MCL 552.601 et seq., when one of the following applies:

> "(a) Except as otherwise provided in this subdivision, the arrearage under the support order is equal to or greater than the monthly amount of support payable under the order. If the support order was entered ex parte, an office shall not initiate enforcement under this subdivision until the office receives a copy of proof of service for the order and at least 1 month has elapsed since the date of service. An office is not required to initiate enforcement under this subdivision if 1 or more of the following circumstances exist:
>
> > "(i) Despite the existence of the arrearage, an order of income withholding is effective and payment is being made under the order of income withholding in the amount required under the order.
> >
> > "(ii) Despite the existence of the arrearage and even though an order of income withholding is not effective, payment is being made in the amount required under the order.
> >
> > "(iii) One or more support enforcement measures have been initiated and an objection to 1 or more of those measures has not been resolved.

> "(b) A parent fails to obtain or maintain health care coverage for the parent's child as ordered by the court. The office shall initiate enforcement under this subdivision at the following times:
>
> > "(i) Within 60 days after the entry of a support order containing health care coverage provisions.
> >
> > "(ii) When a review is conducted as provided in section 17.
> >
> > "(iii) Concurrent with enforcement initiated by the office under subdivision (a).
> >
> > "(iv) Upon receipt of a written complaint from a party.
> >
> > "(v) Upon receipt of a written complaint from the department if the child for whose benefit health care coverage is ordered is a recipient of public assistance or medical assistance.
>
> "(c) A person legally responsible for the actual care of a child incurs an uninsured health care expense and submits to the office a written complaint that meets the requirements of section 11a."

For purposes of support enforcement measures, an arrearage amount that arises at the moment a court issues an order imposing or modifying support must not be considered as an arrearage, unless the payer fails to become current within two months after the entry of the order. MCL 552.511(2).

June 2003

Update: Juvenile Justice Benchbook (Revised Edition)

CHAPTER 5

Petitions and Preliminary Hearings

5.11 Procedures at Preliminary Hearings

Replace the second paragraph on page 99 with the following language:

> **Presence of parent, guardian, or legal custodian.** "The court shall determine whether the parent, guardian, or legal custodian has been notified and is present. The preliminary hearing may be conducted without a parent, guardian, or legal custodian present, provided a guardian ad litem or attorney appears with the juvenile." MCR 3.935(B)(1).

CHAPTER 5

Petitions and Preliminary Hearings

5.15 Required Procedures for Placement of Indian Children in Status Offense and "Wayward Minor" Cases

Replace the first three paragraphs under Section 5.15 with the following language:

Effective May 1, 2003, MCR 3.980(C) was amended. See Michigan Supreme Court Orders 1998-50, 2001-19. MCR 3.980(C) now provides:

> "(1) After Emergency Removal. If an Indian child is removed under subrule (B)(1) or (2), a removal hearing must be completed within 28 days of removal from the parent or Indian custodian.
>
> "(2) Non-Emergency Removal. Except in cases of emergency removal under subrules (B)(1) or (2), a removal hearing must be completed before an Indian child may be removed from the parent or Indian custodian."

MCR 3.980(C)(4) states that "[a] removal hearing may be combined with any other hearing." A removal hearing may be "combined with" a preliminary hearing.

Replace the paragraph on page 107 that begins "**Evidentiary requirements**" with the following language:

Evidentiary requirements. Except for cases of emergency removal, an Indian child must not be removed from the home, or remain removed from the home pending further proceedings, unless there is clear and convincing evidence, including the testimony of at least one expert witness, that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. MCR 3.980(C)(3) and 25 USC 1912(e).

Insert the following language after the first full paragraph on page 108:

MCR 3.980(C)(3) provides an "expert witness" must have knowledge about the child-rearing practices of the Indian child's tribe.

CHAPTER 22

Case Review & Probation Revocation in Designated Case & "Automatic Waiver" Proceedings

22.5 Mandatory Probation Revocation for Commission of a Felony

Replace only the first paragraph in the quote of MCR 6.933(C) at the top of page 463 with the following language:

> "(1) Controlled Substance Violation Punishable by Mandatory Nonparolable Life Sentence For Adults. A juvenile who was placed on probation and committed to state wardship for manufacture, delivery, or possession with the intent to deliver 650 grams (1,000 grams beginning March 1, 2003) or more of a controlled substance, MCL 333.7401(2)(a)(i), may be resentenced only to a term of years, following mandatory revocation of probation for commission of a subsequent felony or a misdemeanor punishable by more than one year of imprisonment."

June 2003

Update: Sexual Assault Benchbook

Note:

Pursuant to Supreme Court Order No. 1998-50 and No. 2001-19, effective May 1, 2003, the Court adopted new subchapter 3.900 of the Michigan Court Rules, deleted subchapter 5.900, and amended rules in subchapter 6.900, all with regard to proceedings involving juveniles. Every effort has been made to identify and update the information contained in this publication where the amendments have a substantive impact. Changes limited to alpha-numeric order and related ministerial revisions are reserved for the next comprehensive update of the publication.

CHAPTER 3

Other Related Offenses

3.16 Indecent Exposure

D. Pertinent Case Law

Insert the following language on page 162 after the last paragraph of Section 3.16, **"4. Consenting Audience No Defense; . . ."**

5. Person Exposed Cannot Also Be Person Offended

In a case of first impression, the Michigan Court of Appeals considered "[w]hether an 'open exposure' is effected if only the defendant witnesses the exposure . . . ." *People v Williams*, ___ Mich App ___, ___ (2003). In *Williams*, the defendant entered the bathroom at a private residence where his 8-year-old niece was bathing. *Williams*, *supra* at ___. The defendant refused his niece's request to leave the room, and he proceeded to draw a picture of the girl and included depictions of her vagina and breasts. *Williams*, *supra* at ___.

The district and circuit courts disagreed with the defendant that an "open or indecent exposure" could not occur in a private residence where all possible

observers were also actors in the alleged criminal conduct. *Williams*, *supra* at ___. Citing *Vronko*, *supra*, the Michigan Court of Appeals recognized that an "open exposure" need not actually be witnessed by another person, provided the exposure occurred in a public place under circumstances in which it was reasonable to expect another person to observe it. *Williams*, *supra* at ___. Notwithstanding *Vronko*, the Court decided that the language of the indecent exposure statute and the cases interpreting it could not justify a finding "that the test for whether a punishable open exposure occurred is whether the *person being viewed* might have been offended by his or her own exposure." *Williams*, *supra* at ___ (emphasis in original).

CHAPTER 6

Specialized Procedures Governing Preliminary Examinations and Trials

6.7 Special Protections For Victims and Witnesses While Testifying

D. Support Person

Replace the language in the cross-reference (designated with *) on page 299 with the following sentence:

Effective May 1, 2003, amendments to the court rules added a subrule requiring notice of intent to use a support person or to request special arrangements restricting the view of the respondent/defendant in juvenile proceedings. MCR 3.922(E).

6.12 Victim Confidentiality Concerns and Court Records

C. Juvenile Delinquency Cases

Replace the text in subsection (C) on page 311 with the following:

The amended court rules effective May 1, 2003, added a new section to the list of files defined as confidential and to which only persons with a legitimate interest have access. MCR 3.903(A)(3)(b) characterizes the contents of a juvenile's social file, including victim statements, as confidential. MCR 3.903(A)(3)(b)(vi).

Under MCL 712A.28(2) and MCR 3.925(D)(1), the general rule is that all *records* in juvenile cases are open to the general public, while *confidential files* are not open to the public. MCR 3.903(24) defines "records" as the pleadings, motions, authorized petitions, notices, memorandums, briefs, exhibits, available transcripts, findings of the court, register of actions, and court orders. MCR 3.903(A)(3)(a) defines "confidential files" as all materials made confidential by statute or court rule, including:

- the separate statement about known victims of juvenile offenses as required by MCL 780.784, and
- the testimony taken during a closed proceeding pursuant to MCR 3.925(A) and MCL 712A.17(7).

"Confidential files" may only be accessed by an individual the court determines has a legitimate interest in the files. MCR 3.925(D)(2). In determining whether a person has a legitimate interest, the court must consider:

- the nature of the proceedings;
- the public's welfare and safety;
- the interest of the minor; and
- any restriction imposed by state or federal law.

CHAPTER 7

General Evidence

7.4 Selected Hearsay Rules (and Exceptions)

H. "Catch-All" Hearsay Exceptions – MRE 803(24) and MRE 804(b)(7)

Insert the following text on page 357 at the end of the text concerning *People v Katt*:

The Michigan Supreme Court disagreed with the defendant's argument that statements coming close to admission under a specific hearsay exception but that do not quite fit within the exception are not admissible under the residual hearsay exception. (This is commonly referred to as the "near miss" theory.) *People v Katt*, ___ Mich ___ (2003).

The Court affirmed the defendant's conviction and declined to apply the "near miss" theory. The Court stated:

> "We agree with the majority of the federal courts and conclude that a hearsay statement is 'specifically covered' by another exception for purposes of MRE 803(24) only when it is admissible under that exception. Therefore, we decline to adoption the near-miss theory as part of our method for determining when hearsay statements may be admissible under MRE 803(24)." ___ Mich at ___.

7.14 Privileges Arising From a Marital Relationship

C. Retroactivity of Amendment to Spousal and Marital Communication Privileges

Replace the first paragraph on page 390 with the following paragraph:

Application of the amended marital communications privilege to introduce communication that occurred between a defendant and a prosecution witness, the defendant's ex-husband, while the parties were still married but before the amendment's effective date, did not violate the *ex post facto* clauses of the United States and Michigan Constitutions. *People v Dolph-Hostetter*, ___ Mich App ___, ___ (2003). *Dolph-Hostetter* is the first Michigan appellate court ruling involving a defendant's challenge to the retroactive application of the amended marital communications privilege in MCL 600.2162.

Insert the following paragraphs at the end of Section 7.14(C) on page 391:

Initially, the Michigan Supreme Court remanded *Dolph-Hostetter*, *supra*, to the Michigan Court of Appeals and directed the Court to "address the ex post facto issue presented in [*Dolph-Hostetter*] in light of *Carmell v Texas* [citations omitted]." *People v Dolph-Hostetter*, 466 Mich 883 (2002). In *Dolph-Hostetter*, the defendant, the defendant's ex-husband (Ronald Hostetter), and a third individual were arrested in 2000 for their involvement in a 1996 murder. *Dolph-Hostetter*, *supra* at ___. The defendant and Hostetter were married at the time of the murder but had divorced in 1997 before they were arrested.

In an agreement to provide testimony against the defendant and the third individual, Hostetter pleaded guilty to second-degree murder. *Dolph-Hostetter*, *supra* at ___. The circuit court agreed with the defendant that retroactive application of the amended marital communications privilege in MCL 600.2162(7) would violate the prohibition against *ex post facto* laws, and the court excluded Hostetter's testimony. *Dolph-Hostetter*, *supra* at ___. As instructed, the Michigan Court of Appeals considered the *ex post facto* issue in light of *Carmell*, *supra*, and reversed the circuit court's ruling.

Carmell involved the expansion of an age-based exception to a Texas law requiring that a child-victim's allegations of a sex offense be corroborated. For the same reasons emphasized by the United States Supreme Court in *Carmell*, *supra*, 529 US at 530-532, the Michigan Court of Appeals concluded that retroactive application of the amended Texas statute violated the prohibition against *ex post facto* laws, but retroactive application of Michigan's amended marital communications privilege did not constitute an *ex post facto* violation. *Dolph-Hostetter*, *supra* at ___. The Texas law was a clear violation of the prohibition against *ex post facto* laws because "[the

statute] essentially lowered the quantum of proof necessary to convict the accused." *Dolph-Hostetter*, *supra* at ___. According to the Court, the statutory amendment at issue in Michigan was dissimilar to the *Carmell* amendment in that "[t]he amendment to the marital communications privilege does not alter the quantum of evidence necessary to convict a person of any crimes; it simply affects which evidence may be introduced at a criminal trial." *Dolph-Hostetter*, *supra* at ___.

The *Dolph-Hostetter* Court explained that the change in evidence under MCL 600.2162(7) was limited to the quantum of evidence *admissible* without the defendant's consent; the amendment had no effect on a defendant's presumptive innocence and the amount of evidence necessary to overcome that presumption. *Dolph-Hostetter*, *supra* at ___. "The amended statute only renders witnesses competent to testify, if they choose, or permits the admission of evidence that previously was inadmissible. It does not make criminal any prior action not criminal when done; it does not increase the degree, severity or nature of any crime committed before its passage; it does not increase punishment for anything done before its adoption; and it does not lessen the amount or quantum of evidence that is necessary to obtain a conviction when the crime was committed." *Dolph-Hostetter*, *supra* at ___.

June 2003

Update: Traffic Benchbook – Revised Edition, Volume 1

Note:

Pursuant to Supreme Court Order No. 1998-50 and No. 2001-19, effective May 1, 2003, the Court adopted new subchapter 3.900 of the Michigan Court Rules, deleted subchapter 5.900, and amended rules in subchapter 6.900, all with regard to proceedings involving juveniles. Every effort has been made to identify and update the information contained in this publication where the amendments have a substantive impact. Changes limited to alpha-numeric order and related ministerial revisions are reserved for the next comprehensive update of the publication.

CHAPTER 1

Required Procedures for Civil Infractions

1.3 Courts With Jurisdiction of Traffic Civil Infractions

Replace the paragraph beginning with, "However, the Family Division . . . ," with the following paragraph:

Effective May 1, 2003, MCR 3.903(B)(3) changed the definition of "offense by a juvenile." "Offense by a juvenile" means an act in violation of a criminal statute, a criminal ordinance, a traffic law, or a provision of MCL 712A.2(a) or (d). The former court rule limited the jurisdiction of the Family Division of Circuit Court to traffic violations other than civil infractions. Thus, the new definition no longer precludes the Family Division from exercising jurisdiction over a juvenile accused of a civil infraction.